

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
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)	
Expanding the Economic and Innovation)	
Opportunities of Spectrum Through Incentive)	GN Docket No. 12-268
Auctions)	
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COMMENTS OF THE WALT DISNEY COMPANY

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Executive Summary

The Walt Disney Company (“Disney”), by its attorneys, respectfully submits the instant comments (“Comments”), on behalf of itself, the ABC Owned Television Stations, as defined herein, and ESPN, Inc. (“ESPN”), in the instant proceeding in which the Federal Communications Commission (“FCC” or “Commission”) seeks comment on various proposals relating to implementation of the incentive auction and repacking of broadcast spectrum. In these Comments, Disney urges the Commission to consider carefully the ongoing impact of the digital television (“DTV”) transition on the ability of VHF television stations to serve their viewers with a reliable over-the-air digital signal on a continuous basis, even today, and to refrain from taking any action that would effectively negate the ongoing efforts of such stations to restore service to their historical over-the-air viewing areas.

As an initial matter, it is imperative that the FCC adopt rules that protect licenses and construction permits authorized or applied for after enactment of the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), particularly where such authorizations are required to enable VHF broadcasters to restore service to those over-the-air viewers they were serving prior to the DTV transition. Such rules are entirely consistent with the Spectrum Act, as well as long-standing Congressional and Commission goals for the full-power DTV transition. Moreover, the Commission should ensure that stations assigned a VHF channel after the repacking are permitted to operate at technical parameters, and receive interference protection, that enables replication of over-the-air analog viewership. The proposal to protect only those facilities licensed as of February 22, 2012 will not ensure that VHF stations can provide an over-the-air signal to their audiences because it does not recognize implementation of facilities modifications that have resulted in incremental improvements in reception of over-the-air digital service. This proposal also is inappropriate because broadcast stations had no notice that licenses or construction permits authorized or applied for after February 22, 2012 would not receive protection during the incentive auction and repacking process.

In these Comments, Disney urges the Commission to protect licenses and construction permits authorized or applied after February 22, 2012, including, in particular, full-power construction permits required to effectuate a channel change necessitated by the DTV transition, and those construction permits obtained to implement interference agreements intended to facilitate replication of former over-the-air analog viewing areas, particularly in the New York City television market. Protection of construction permits (and applications for such permits) is appropriate because it is the construction permit process—and not the licensing process—that establishes a station’s coverage area, population served and rights to interference protection. Moreover, the Commission should protect full-power construction permits and applications intended to restore service to over-the-air analog viewers because the FCC’s justifications in the *Notice of Proposed Rulemaking* (“NPRM”) for protection of digital Class A facilities apply equally to full-power stations that were unable to fulfill the replication goal using facilities with the technical parameters assigned to them by the FCC. It also is critical that the Commission protect repacked stations that operate digital facilities in excess of the power limits set forth in the FCC’s rules in order to replicate their over-the-air analog viewing areas.

Disney further urges the Commission to ensure that repacked stations are provided adequate time to construct facilities on new channels and to take the time necessary to minimize the potential negative impact on viewers. As the FCC is aware, transitioning to a new channel is a complicated undertaking and it can take many years to obtain the requisite information to determine the technical parameters for a relocated station, as was the case with the DTV transition. Even after the most deliberate and careful engineering, however, the “paper” technical parameters may not perform as anticipated, as was the DTV experience of many of the ABC Owned Television Stations. Moreover, the construction process itself involves many steps and, particularly in urban markets, is likely to require significantly more than eighteen months. Because it is likely that stations will be transitioning to their “repacked” channels under varying circumstances, it is important that the Commission provide stations with maximum flexibility and discretion to determine how best to notify their viewers of potential changes in service that may result from the incentive auction and repacking.

Finally, Disney respectfully requests that the Commission adopt rules that will offset any decreases in the amount of spectrum available for low power auxiliary services and wireless microphone operations following the incentive auction and repacking. As demonstrated in these Comments, broadcasters, video programming networks, and other entities in the entertainment industry utilize wireless microphones every day on an extensive and widespread basis to cover news and sports events. Such use is not occasional, fleeting use but rather is an absolute necessity to ensure that the sounds of events are heard by viewers, as well as to facilitate seamless communications between producers and talent. Thus, the FCC should (i) retain spectrum solely for use by licensed wireless microphone systems, including by retaining the two channels currently reserved for licensed wireless use and by creating new blocks of spectrum for wireless microphones to operate on an interference-free basis; (ii) authorize operations of wireless microphones in guard band spectrum; and (iii) permit wireless microphones to operate in any spectrum authorized for WiFi and other unlicensed devices, including on unused spectrum (*i.e.*, white spaces) in the television band.

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In the Matter of)	
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Innovation in the Broadcast Television Bands:)	
Allocations, Channel Sharing and)	GN Docket No. 12-268
Improvements to VHF)	
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COMMENTS OF THE WALT DISNEY COMPANY

The Walt Disney Company (“Disney”),¹ by its attorneys, respectfully submits the instant comments (“Comments”) in the above-captioned proceeding in which the Federal Communications Commission (“FCC” or “Commission”) seeks comment on various proposals relating to implementation of the incentive auction and repacking of broadcast spectrum.² These Comments focus primarily on the FCC’s proposals regarding protection of the coverage areas of, and populations served by, full-power television stations and those that relate to wireless microphone operations.

As described herein, it is critical that the Commission refrain from taking any action in this proceeding that would inhibit broadcasters like the ABC Owned Television Stations from providing a reliable over-the-air signal to the viewing areas they have served historically, in some cases, for over sixty years. Television broadcasting’s unique one-to-many architecture allows it

¹ Disney is filing these Comments on behalf of itself, the ABC Owned Television Stations and ESPN (80% owned by Disney). The ABC Owned Television Stations are located in the following markets: New York (WABC-TV), Los Angeles (KABC-TV), Chicago (WLS-TV), Philadelphia (WPVI-TV), San Francisco (KGO-TV), Houston (KTRK-TV), Raleigh-Durham (WTVD(DT)), and Fresno (KFSN-TV).

² See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, GN Docket No. 12-268 (rel. October 2, 2012) (“*Incentive Auction NPRM*”).

to deliver programming, including coverage of major live events, and emergency information to a multitude of Americans at once. Given this unique and important ability, the Commission must take care to continue to appreciate and cultivate the major role that television broadcasting has, and will continue, to play in America's media landscape.

Notwithstanding the fact that both Congress and the Commission sought to ensure that broadcasters' viewers were not "lost" during the digital television ("DTV") transition, broadcasters operating on VHF channels as of June 12, 2009 did, in fact, suffer significant setbacks with their ability to serve their viewers. Since June 2009, these broadcasters have worked—and, in some cases, are continuing to work—earnestly and diligently to restore service to their former over-the-air viewing areas. It would be inconsistent with the legislative goals of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"),³ as well as Congress's objectives for the DTV transition, to adopt rules that would fail to protect licenses or construction permits that have enabled a VHF station to replicate its historical over-the-air viewing area, even if these licenses or permits were authorized or applied for after February 22, 2012.⁴

Moreover, given that a primary goal of the *Notice of Proposed Rulemaking* ("NPRM") is to adopt rules to encourage stations to relinquish UHF spectrum in exchange for VHF channel assignments, the FCC must ensure that its technical rules for the repacking facilitate replication of existing over-the-air audiences of VHF television broadcasters, and that its interference rules take into account actual viewers (rather than rely on percentage-based standards). The

³ Pub. L. No. 112-96, 125 Stat. 156 (2012) ("Spectrum Act").

⁴ In these Comments, Disney is primarily concerned with ensuring that it receives interference protection for, and preservation of the coverage areas and populations served by the ABC Owned Television Stations prior to the DTV transition. In other words, Disney is not advocating that the FCC adopt rules that would further expand the coverage areas of, or populations served by, the ABC Owned Television Stations.

Commission also should provide stations with adequate time to engineer and construct facilities affected by the repacking, and permit broadcast stations to determine the best way in which to educate their viewers regarding the process.

Finally, in light of the extensive and widespread use of UHF spectrum for wireless microphones, the Commission should not in any manner limit or restrict wireless microphone operations in any spectrum currently permitted under FCC rules and policies but rather should adopt rules that ensure sufficient spectrum for wireless microphone uses such as those described in these Comments.

I. THE COMMISSION SHOULD TAKE INTO ACCOUNT THE ONGOING IMPACT OF THE DTV TRANSITION ON VHF BROADCASTERS WHEN EVALUATING ITS PROPOSALS FOR THE REPACKING

The ABC Owned Television Stations have served their viewers with over-the-air signals for many decades, and all use or have used VHF channels for their pre- and/or post-transition digital broadcasts. Accordingly, the ABC Owned Television Stations have firsthand knowledge of the challenges associated with utilizing spectrum in the VHF band to provide over-the-air digital service. As explained below, when the DTV transition occurred on June 12, 2009, WABC-TV (New York, New York), WLS-TV (Chicago, Illinois), WPVI-TV (Philadelphia, Pennsylvania), and WTVD(DT) (Raleigh-Durham, North Carolina), in particular, were not able to replicate their over-the-air analog coverage with the digital facilities assigned to them by the FCC, and have been working since that time to achieve replication.⁵ After several years of

⁵ These Comments generally focus on the experiences of WABC, WLS, WPVI, and WTVD, as these particular ABC Owned Television Stations experienced the greatest difficulties with the DTV transition. Indeed, as the Commission is well-aware, following the DTV transition, a large number of viewers of WABC, WLS, WPVI, and WTVD were unable to receive reliable over-the-air digital signals due to the technical challenges associated with the VHF spectrum frequencies allotted to the ABC Owned Television Stations in these markets. As a result, these viewers no longer had access to ABC-network or locally-produced programming

diligence, these stations now have obtained FCC licenses to operate broadcast facilities that represent the closest approximation of their analog viewing areas to date, in some cases pursuant to privately-negotiated interference agreements and/or waivers of the Commission's rules governing maximum power levels. As explained in these Comments, it would contravene the public interest and legislative intent to interpret the Spectrum Act in any way that would effectively negate the improvements in service that were necessary to enable WABC, WLS, WPVI and WTVD to restore a reliable over-the-air signal to the viewing areas they have served for sixty or more years.

A. WABC-TV, New York, New York

WABC, the flagship station of the ABC television network, has served the New York, New York designated market area (“New York DMA”) for over sixty years, commencing analog operations on channel 7 on August 10, 1948 and pre-transition digital operations on channel 45 in 2001.⁶ Notably, WABC was one of several television broadcast stations serving the New York DMA that was required to relocate broadcast operations to the Empire State Building as a result of the 9/11 attacks.⁷ The forced relocation of multiple broadcast operations and loss of one of the few available television antenna locations in Manhattan significantly limited the ability of

(including news, emergency information, and other public affairs programming) received prior to the DTV transition.

⁶ See FCC File No. BLCDDT-20010710ABU.

⁷ After losing its original DTV facility on September 11, 2001, WABC constructed two replacement DTV facilities, first at 4 Times Square and subsequently at the Empire State Building. See FCC File Nos. BDSTA-20031024AAW (4 Times Square) and BXSTA-20040728APD (Empire State Building). In addition, prior to the DTV transition, WABC maintained an auxiliary facility on channel 7 at Alpine Tower in the event of an emergency resulting in the loss of WABC service from other authorized sites. See FCC File No. BMDSTA-20040419ACL.

stations to operate from their preferred sites and thus created unique challenges for these stations' ability to construct digital facilities that would replicate their analog viewing audiences.⁸

On June 12, 2009, WABC transitioned to all-digital broadcasts from the Empire State Building on channel 7 using a facility with the technical parameters assigned by the FCC for its post-transition operations.⁹ As the Commission is well-aware, however, the New York DMA was one of the markets where viewers faced significant difficulties with indoor reception of DTV signals following the transition. WABC was no exception and, following its transition to all-digital broadcasts on June 12, 2009, WABC promptly learned that it could not serve many of its former over-the-air analog viewers with the 11.69 kilowatts ("kW") effective radiated power ("ERP") authorized by the Commission for its post-transition facility on channel 7, notwithstanding that this power level was the maximum permitted under the FCC's rules.¹⁰

WABC worked diligently with the Commission and other affected television stations to find a solution to the signal reception issues unique to VHF digital television service and ultimately determined that it was necessary to enter into agreements pursuant to which WABC and other affected stations agreed to accept additional interference to facilitate mutual power increases. Specifically, WABC entered into two separate privately-negotiated interference agreements to enable it to increase its power to the level necessary to replicate its over-the-air

⁸ See *infra* Section III.D.

⁹ WABC elected to transition to channel 7 (rather than channel 45) for its post-transition broadcasts because WABC would have suffered population losses as a result of at least two known interference conflicts if it operated digitally on channel 45 after the full-power DTV transition. See *Emergency Request for Waiver of American Broadcasting Companies, Inc. and WPIX, Inc.*, MB Docket No. 03-15, FCC File No. BFRECT-20050209AKQ (filed Aug. 15, 2005).

¹⁰ In the days and weeks following the DTV transition on June 12, 2009, WABC received thousands of telephone calls from viewers that had previously received WABC's analog signal, but no longer could view the station.

analog viewing area.¹¹ In connection with these interference agreements, WABC agreed to provide substantial compensation to some of the other affected stations so that they, too, could implement power increases to better serve their viewers. Pursuant to these interference agreements and waivers of the Commission's rules governing maximum power levels for VHF stations, WABC obtained the requisite FCC authorizations to increase its power in two steps, first to 26.9 kW ERP¹² and, most recently, to 34 kW ERP.¹³ Although WABC filed its application for a construction permit for the aforementioned 34 kW ERP facility on February 16, 2012, prior to the enactment of the Spectrum Act, FCC action on the application was delayed until early October 2012 due to the need to obtain approval from Canada for the facilities proposed by certain of the other stations that were party to the interference agreement.¹⁴ Promptly after the

¹¹ Specifically, on January 5, 2010, WABC executed a complicated three-way interference agreement to enable each of WABC, WNJB(DT) (New Brunswick, New Jersey), and WGAL(DT) (Lancaster, Pennsylvania) to effectuate power increases in order to improve each station's respective coverage area. *See, e.g.*, FCC File No. BPCDT-20090626ABL. Pursuant to this interference agreement, in September 2011, WABC obtained a license to increase its power to 26.9 kW. *See* FCC File No. BLCDDT-20110503ACF. Thereafter, on January 9, 2012, WABC entered into a second interference agreement with WBNG-TV (Binghamton, New York), WXXA-TV (Albany, New York), and WWNY-TV (Carthage, New York) to permit all four stations to increase their respective power levels to better serve their viewers.

¹² *See* FCC File No. BLCDDT-20110503ACF (covering FCC File No. BPCDT-20090626ABL). Implementation of the increase in power to 26.9 kW did not resolve the reception problems experienced by WABC's over-the-air viewers, and WABC continued to receive nearly one hundred calls a month from viewers complaining about their inability to view the station over-the-air. This call volume does not take into account the many viewers that simply stopped calling the station, even though they, too, could not receive an over-the-air digital signal.

¹³ *See* FCC File No. BPCDT-20120216ADO. This application requested a waiver of Section 73.622(f)(7)(ii) of the FCC's rules, which limits the maximum power at which WABC could operate to 11.69 kW. *See id.* In addition, the application proposed facilities that likely would define WABC as the largest facility in the market and thus also sought a waiver of 73.622(f)(7)(ii) of the FCC's rules. *Id.*

¹⁴ Specifically, the power increases proposed by WXXA and WBNG required coordination with Canada. Although WWNY's construction permit application was initially sent by the FCC staff to Canada for coordination, it was later determined that such coordination was not required.

staff granted WABC's construction permit application for the 34 kW ERP facility, WABC filed a license application, which was granted by the Commission on November 26, 2012.¹⁵

WABC's currently licensed digital facilities, which are the result of the station's ongoing and diligent efforts since mid-2009 to improve over-the-air service for its viewers, represent the closest approximation to date of the viewing area that WABC has served for over sixty years. Even with these facilities, however, WABC still has many viewers that cannot receive a reliable over-the-air digital signal.¹⁶ Accordingly, as set forth in these Comments, in order to ensure that WABC's viewers continue to receive over-the-air digital service following the incentive auction process, the Commission should protect fully the coverage area of, and population served by, WABC's 34 kW ERP facility, notwithstanding that the facility was not licensed prior to enactment of the Spectrum Act.

B. WLS-TV, Chicago, Illinois

For over sixty years, WLS operated on VHF channel 7 to provide over-the-air analog television service to viewers in the Chicago, Illinois designated market area ("Chicago DMA"). On June 12, 2009, WLS transitioned to all-digital broadcasts on channel 7 with a facility operating in accordance with the technical parameters assigned to it by the FCC.¹⁷ Within a few days after the DTV transition, WLS received over 20,000 viewer complaints regarding their inability to receive an over-the-air digital signal from WLS's post-transition facility, even though this facility operated at the maximum power level permitted under FCC rules.¹⁸

¹⁵ See FCC File No. BLCDT-20121031ABC.

¹⁶ Indeed, many viewers in the New York DMA can receive UHF stations but not VHF stations, even though the DTV transition occurred over three years ago and stations like WABC have expended substantial time and money to attempt to improve reception for the viewers.

¹⁷ See FCC File No. BLCDT-20090612AEE.

¹⁸ WLS has documented its post-transition difficulties in numerous filings submitted to the FCC. See, e.g., *WLS Television, Inc., Petition for Rulemaking to Amend the DTV Table of Allotments* (filed July 24, 2009) ("Channel 44 Petition"); *WLS Television, Inc., Application for*

Promptly after the DTV transition, WLS worked diligently with the FCC staff to develop a solution to the reception challenges faced by WLS's viewers.¹⁹ WLS ultimately determined that, by relocating from channel 7 to channel 44, it likely could restore service to its former over-the-air analog viewers in conformance with the FCC's technical rules. Accordingly, WLS filed a petition for rulemaking to substitute its channel 7 digital allotment with digital channel 44 at Chicago, Illinois, which petition was granted on September 14, 2009.²⁰ WLS subsequently obtained a construction permit for the facilities described in its channel change petition in October 2009.²¹

WLS worked diligently to transition to channel 44 as quickly as possible, and expended substantial resources (financial, technical, labor and otherwise) and time to achieve its goal of serving its viewers with a reliable over-the-air DTV signal. The construction process not only was a complex, multistep process,²² it also involved many factors outside of WLS's immediate

Experimental Authority to Increase ERP to 9.5 kW (filed July 21, 2009); *see also* FCC File Nos. BELDSTA-20101005AAU, BELDSTA-20100408ACD, BDSTA-20090908ABP, BDRTCDT-20090817ACC, & BDRTCDT-2009630AFT.

¹⁹ To this end, WLS considered a number of options, including (i) increasing its power on channel 7 pursuant to interference agreements with affected television stations; (ii) finding another suitable channel for its post-transition DTV operations; (iii) operating "fill-in" translators on various channels; and (iv) using a directional antenna. *See, e.g.*, FCC File Nos. BDRTCDT-20090630AFT & BEXP-20090619ADB.

²⁰ *See* Channel 44 Petition, *supra* note 18; *Amendment of Section 73.622(i), Final DTV Table of Allotments, Television Broadcast Stations (Chicago, Illinois)*, Report and Order, 24 FCC Rcd 11880 (MB 2009).

²¹ *See* FCC File NO. BPCDT-20091001ACI, as modified by FCC File No. BMPCDT-20110331ABW.

²² For example, to relocate from channel 7 to channel 44, it was necessary to: (i) obtain a high-power UHF transmitter; (ii) obtain an appropriate UHF antenna; (iii) obtain suitable RF components; (iv) coordinate a substantial construction effort to replace the formerly licensed VHF channel 7 antenna with a new UHF antenna at the top of the Willis Tower (formerly known as the Sears Tower), the tallest building in the western hemisphere; and (v) install a new transmitter, along with its associated transmission line and RF components. Installation of the channel 44 antenna in and of itself was a complex undertaking that required the design and construction of a 4,000 pound "wedding cake" adapter, which was galvanized, x-rayed, and inspected prior to installation.

control (such as the need to obtain permits from the city of Chicago to authorize the use of a helicopter to remove the channel 7 antenna and replace it with the channel 44 antenna).²³

Nevertheless, WLS successfully commenced broadcasts on channel 44 in October 2012, prior to expiration of its construction permit.²⁴ As explained below, although the FCC staff did not issue a license for WLS's channel 44 facility until November 26, 2012, the Commission should protect this facility during the repacking process to prevent WLS's viewers from once again losing the over-the-air service that it was providing its viewers prior to the DTV transition.

C. WPVI-TV, Philadelphia, Pennsylvania

WPVI has served the Philadelphia, Pennsylvania designated market area ("Philadelphia DMA") on channel 6 since September 1947, and commenced pre-transition digital broadcasts on channel 64 in 1998.²⁵ On June 12, 2009, WPVI transitioned from its out-of-core pre-transition digital channel to channel 6 (its former analog channel) notwithstanding that WPVI had

²³ For example, because the national standards for structural engineering have changed in the decades since WLS constructed its channel 7 facilities on the then-Sears Tower, WLS was required to conduct an extensive wind load and Vortex shedding study of the new channel 44 antenna on the top of the east mast of Willis Tower. This study took months of analysis and resulted in a 5,000 page multi-binder report that was not only required to be submitted for peer review but also had to be approved by the city of Chicago in order for WLS to obtain a structural permit for the channel 44 facility.

The need to use a helicopter also interjected unique challenges into the construction project for the channel 44 facility. In order to install the channel 44 antenna at the height authorized in WLS's construction permit, it was necessary to schedule a helicopter that could handle the load of the channel 44 antenna as well as the height challenges. Such a helicopter was not available in Illinois such that WLS contracted with a company in Michigan to provide the helicopter. This company ultimately scheduled a helicopter from Canada to perform the installation of the channel 44 antenna.

²⁴ See FCC File No. BLCDT-20121016ABX (granted Nov. 26, 2012). Although WLS has been broadcasting since October 2012 from its channel 44 facility at Willis Tower pursuant to its construction permit, it still is working to satisfy requirements imposed on it by the Willis Tower and the city of Chicago, such as the completion of a fiberglass radome around the antenna structure.

²⁵ See FCC File No. BLCDT-19981112KE.

significant concerns about the viability of channel 6 for digital broadcasts.²⁶ Immediately thereafter, it became clear that WPVI simply could not serve its longtime viewing area with an over-the-air digital signal at the technical parameters assigned to it by the FCC.²⁷

ABC worked with the FCC to help address the coverage deficiencies resulting from the channel 6 allocation and initially was authorized by the FCC to increase its power to 30.2 kW ERP (beyond the levels prescribed in the Commission's rules) in an effort to boost its signal to improve over-the-air reception for its viewers.²⁸ However, even after licensing the 30.2 kW facility, WPVI continued to receive fifty to one hundred telephone calls a week regarding

²⁶ See FCC File No. BLCDDT-200906012ACL. ABC struggled to find a channel for WPVI that would permit it to reach its former analog viewers and, reluctantly, chose channel 6, despite well-documented technical concerns about the channel's post-transition feasibility. Because of the well-known issues surrounding the suitability of channel 6 and other low-VHF channels for DTV operations, ABC was compelled to forego making a channel election for WPVI in round one of the Commission's channel election process and instead elected to participate in the second round of DTV channel elections (in lieu of selecting channel 6). ABC also protected its rights to select another channel in the second round by objecting to a negotiated channel election agreement ("NCA") between two other Philadelphia-area stations.

ABC conducted multiple technical studies over an extended period of time in an attempt to locate another suitable channel for WPVI's post-transition DTV operations. The engineering studies demonstrated that special problems did, in fact, exist for low-VHF channels but that channel 6 was the only viable option from which WPVI could possibly replicate its analog service. In addition to the results of the engineering studies, ABC also balanced several other interests in reaching its decision to amend its channel election to channel 6, including (i) congested spectrum in the northeast corridor, (ii) the interests of WPVI's viewers (and their interest in continuity of service), (iii) ABC's interest in certainty and a speedy resolution, (iv) the interests of other stations and the absence of available post-transition DTV channel options in the nation's fourth largest television market, (v) the NCA that effectively removed the only suitable replacement channel from the pool of available channels (which ABC initially opposed), and (vi) the general public interest. Indeed, ABC's decision to elect channel 6 despite questions regarding the channel's post-transition feasibility resolved a long-standing dispute in a manner that enabled the most television stations to serve the most people, and thus benefited other television stations as well as viewers in the Philadelphia DMA.

²⁷ WPVI received countless telephone calls from viewers following the transition stating that they no longer could receive a signal from WPVI, notwithstanding that these viewers previously had received an over-the-air analog signal without issue.

²⁸ To this end, the FCC initially granted WPVI special temporary authority to operate on channel 6 at 30.2 kW ERP; these facilities were subsequently licensed to WPVI by the FCC. See FCC File Nos. BLDSTA-20090619ADQ & BLCDDT-20110503ACH.

viewers' inability to receive an over-the-air signal. Thus, ABC applied for a construction permit to further increase its power, from 30.2 kW to 34 kW ERP,²⁹ and, on February 17, 2012, WPVI was granted a license for these facilities.³⁰

It is imperative that the Commission refrain from adopting rules that would reduce the coverage area of, or decrease the population served by, WPVI's currently licensed facility, which it operates pursuant to a waiver of the Commission's rules governing power limits for VHF stations.³¹ Moreover, because WPVI's viewers continue to face challenges with reception of an over-the-air digital signal from the 34 kW facility,³² the Commission should, consistent with the Spectrum Act and Congress's objectives regarding the DTV transition, protect the facilities specified in ABC's pending application for a construction permit to implement an additional power increase for WPVI in accordance with a privately negotiated interference agreement.³³

²⁹ See FCC File No. BMPCDT-20110831ABM (modifying FCC File No. BPCDT-20110525ACX, initially granted on June 13, 2011).

³⁰ See FCC File No. BLCDT-20111019ACJ. Additionally, under the FCC's rules, WPVI is defined as the largest station in the Philadelphia market. See 47 C.F.R. § 73.622(f)(5).

³¹ Because WPVI obtained a license for its 34 kW facility on February 17, 2012, the Commission should preserve the coverage area of, and population served by, this facility pursuant to its proposal in the *NPRM*. See *Incentive Auction NPRM* ¶ 98. Nevertheless, in light of the apparent ambiguity of the FCC's proposal to deny protection to stations that operate with higher power levels than permitted under the FCC's rules, Disney is addressing protection of WPVI's 34 kW facility in these Comments. See *infra* Section III.E.

³² WPVI continues to receive several telephone calls every week from viewers complaining of their inability to receive an over-the-air digital signal.

³³ See FCC File No. BPCDT-20120604ACE. Even though WPVI increased its power to 34 kW in October 2011, its viewers continue to face reception problems, many of which appear to result from lack of sufficient signal level at many viewers' locations. WPVI believes that most of these remaining reception problems could be solved by further increasing its power, from 34 kW to 62.9 kW ERP. Accordingly, subsequent to increasing its power to 34 kW, ABC worked to negotiate and execute an interference agreement with the licensee of WRGB(DT) (Albany, New York) ("WRGB") pursuant to which WRGB agreed to accept additional interference that is predicted to result if WPVI increases its power to 62.9 kW ERP. For a variety of reasons, including the fact that the then-licensee of WRGB was involved in Chapter 11 bankruptcy proceedings, ABC was unable to finalize the interference agreement until mid-April 2012. Thereafter, ABC filed the aforementioned application for a construction permit to modify its facilities.

D. WTVD(DT), Durham, North Carolina

WTVD has served the Raleigh-Durham, North Carolina designated market area (“Durham DMA”) on channel 11 since September 2, 1954, and commenced DTV operations on channel 52, its out-of-core pre-transition channel, in November 1999.³⁴ In June 2009, WTVD transitioned its digital operations to VHF channel 11 with a facility using the technical parameters assigned to WTVD by the FCC.³⁵ Shortly thereafter, WTVD received many calls from viewers who were able to receive WTVD on analog channel 11, but could no longer receive an over-the-air signal on channel 11 after the DTV transition.

WTVD determined that, in order to replicate its longstanding viewing area with a VHF digital channel allotment, it was necessary to increase its power beyond the level permitted by the FCC’s rules.³⁶ However, because this power increase was predicted to cause additional interference to other television stations in excess of that permitted under the Commission’s rules, it also was necessary for WTVD to negotiate an interference agreement with these stations.³⁷ Execution of this interference agreement and grant of WTVD’s request for a waiver of the FCC’s power rules were essential to WTVD’s ability to construct facilities that were intended to

³⁴ See FCC File No. BLCDDT-19991117ABU.

³⁵ See FCC File No. BLCDDT-20090612ACW.

³⁶ WTVD first obtained special temporary authority to increase its power from 20.7 kW to 45 kW ERP. See FCC File No. BDSTA-20091001ADW. Thereafter, in August 2010, the FCC granted WTVD’s long-pending application for a construction permit to operate the 45 kW facilities pursuant to a waiver of the FCC’s rules regarding maximum power levels, which establishes 29.55 kW ERP as the maximum ERP for WTVD. See FCC File No. BPCDDT-20090922ABF. In addition, the licensed WTVD facility likely is defined as the largest station in the Durham DMA. See 47 C.F.R. § 73.622(f)(5).

³⁷ The stations that are party to interference agreements with WTVD are WNCT-TV (Greenville, North Carolina), WVPT-DT (Staunton, Virginia), WTVI-TV (Charlotte, North Carolina), and WCTI-TV (New Bern, North Carolina).

replicate its over-the-air analog viewing area.³⁸ Even today, however, WTVD continues to receive complaints from its viewers indicating that they cannot consistently receive a reliable over-the-air digital signal. Thus, notwithstanding that WTVD is operating at the maximum power level possible given the FCC's rules regarding interference, it cannot provide a reliable digital signal to all of its former over-the-air analog viewers on an ongoing basis. Accordingly, as explained herein, the Commission should adopt rules that will preserve the coverage area of, and population served by, WTVD's licensed facility, notwithstanding that it operates pursuant to a waiver of the FCC's rules regarding maximum power limits.³⁹

II. IT IS CONSISTENT WITH THE SPECTRUM ACT TO MINIMIZE LOSS OF VHF TELEVISION SERVICE BY PROTECTING LICENSES AND CONSTRUCTION PERMITS AUTHORIZED OR APPLIED FOR AFTER FEBRUARY 22, 2012

Section 6403(b)(2) of the Spectrum Act requires the FCC to “make all reasonable efforts to preserve, as of [February 22, 2012], the coverage area and population served of each broadcast television licensee”⁴⁰ This statutory mandate was enacted in direct response to concerns of broadcasters that the incentive auction process could harm the viability of local television service for viewers who rely on over-the-air television for news, information, and other new and innovative services.⁴¹ Accordingly, it is entirely consistent with the Spectrum Act, and long-

³⁸ See *supra* note 36 (discussing WTVD's subsequent license modification application which did not change the coverage area of, or population served by, the 45 kW facility authorized in May 2011).

³⁹ WTVD obtained a license for its 45 kW facility on May 20, 2011, well before enactment of the Spectrum Act. Accordingly, the Commission should preserve the coverage area of, and population served by, this facility pursuant to its proposal in the *NPRM*. See *Incentive Auction NPRM* ¶ 98. Nevertheless, in light of the apparent ambiguity of the FCC's proposal to deny protection to stations that operate with higher power levels than permitted under the FCC's rules, Disney is addressing protection of WTVD's 45 kW facility in these Comments. See *infra* Section III.

⁴⁰ Spectrum Act, § 6403(b)(2).

⁴¹ See, e.g., 158 Cong. Rec. H907, 914 (daily ed. Feb. 13, 2012) (statement of Rep. Walden) (emphasizing that broadcasters would be protected by the legislation and that viewers “will still be able to see and watch their over-the-air public and private broadcasters”); John

standing Congressional and Commission goals for the full-power DTV transition, to promulgate rules that protect licenses and construction permits authorized or applied for after February 22, 2012, particularly where such authorizations are required to restore service losses attributable to the DTV transition and merely enable VHF broadcasters to restore service to those over-the-air viewers they were serving prior to the DTV transition.⁴² Moreover, because the Spectrum Act expressly recognizes the inferiority of VHF spectrum, stations assigned a VHF channel after the repacking should be permitted to operate at technical parameters, and receive interference protection, that enables replication of over-the-air viewership. The Commission's current proposal simply will not ensure that broadcast stations that have been assigned a VHF channel (whether at the time of the DTV transition or thereafter) can continue provide an over-the-air signal to their long-established viewing areas following the incentive auction and repacking process. Notably, this proposal is contrary to the public interest because broadcast stations had

Eggerton, *Incentive Auctions Are Part of Payroll Package*, Multichannel News, Feb. 16, 2012, <http://www.multichannel.com/content/incentive-spectrum-auctions-are-part-payroll-package> (discussing "compromise legislation" that included language requiring the FCC to protect the coverage areas and interference protections for repacked stations).

⁴² In addition, the Commission should protect the coverage areas of, and populations served by, replacement translator stations, such as that operated by KGO-TV. *See* FCC File No. BLCDDT-20111201NYO (granted Jan. 4, 2012). The FCC specifically established the replacement translator service for the purpose of enabling full-power digital stations to "fill-in" gaps in digital coverage so that all viewers had access to a receivable over-the-air digital signal. *See In re Amendment of Parts 73 & 74 of the Commission's Rules*, Report and Order, 24 FCC Rcd 5931, 5932 ¶ 2 (2009) ("*Replacement Translator Order*"). As a result of this action, stations operating on VHF channels, like KGO-TV, have been able to provide service to those over-the-air analog viewers that could not receive a signal from the main VHF facility. It would be contrary to the public interest to fail to protect such replacement translators, particularly where viewers have come to rely on such translators to rectify deficiencies in VHF television service. Moreover and importantly, when authorizing replacement translators, the Commission determined that such translators should be associated with the station's main license, and that these translators cannot be separately assigned, transferred or renewed. *See id.* at 5941-42. In other words, replacement translators (unlike other translators) are an integral part of a station's digital coverage. Finally, because the Spectrum Act expressly recognizes the inferiority of VHF spectrum, the Commission must take special care not to promulgate rules that would impair the ability of VHF digital stations to serve their over-the-air viewing areas and, for this reason, must take digital "fill-in" translators into account and protected in the repacking process.

no notice that licenses or construction permits authorized or applied for after February 22, 2012 would not receive protection during the incentive auction and repacking process.

A. It Is Consistent With The Spectrum Act To Protect Licenses And Construction Permits Authorized Or Applied For After Enactment of the Spectrum Act

In the *NPRM*, the Commission states that it is statutorily obligated to protect only television facilities licensed as of February 22, 2012.⁴³ This interpretation not only is inconsistent with Congress’s goal of ensuring the continued viability of over-the-air television service following the incentive auction, it also is not mandated by the plain language of the statute.

In enacting section 6403(b)(2), Congress was specifically concerned that broadcasters that did not voluntarily choose to participate in the incentive auction could continue to serve their viewers, particularly those “who rely on over-the-air broadcast for entertainment and public emergency information.”⁴⁴ In other words, Congress sought to ensure that repacked broadcasters would be able to serve their over-the-air viewers in the same manner as they have always done, in many cases for several decades. Thus, contrary to the Commission’s interpretation of section 6403(b)(2), Congress was not focused upon protection of facilities that were licensed as of a certain date, but rather on ensuring that “broadcasters that relocate due to repacking do not lose

⁴³ See, e.g., *Incentive Auction NPRM* ¶ 98 & n.151. Although the Commission proposes to protect additional facilities in the *NPRM*, the FCC appears to believe that protection of such facilities is discretionary under the Spectrum Act. See *Incentive Auction NPRM* ¶ 113 (“[W]e do not interpret [section 6403(b)(2)] to prohibit the Commission from granting protection to additional facilities where appropriate.”).

⁴⁴ See, e.g., 158 Cong. Rec. E238 (daily ed. Feb. 24, 2012) (statement of Rep. Upton) (“To protect broadcasters, however, subsection (b) prohibits the FCC from involuntarily relocating broadcasters from UHF channels to VHF channels. It also requires the FCC to make all reasonable efforts to preserve relocating broadcasters’ coverage area and population served.”); 157 Cong. Rec. S4933 (daily ed. July 27, 2011) (statement of Sen. Kirk) (“[W]e should protect broadcasters who choose not to participate in such actions and their customers who rely on over-the-air broadcast for entertainment and public emergency information . . .”).

over-the-air viewers as a result of that move.”⁴⁵ Accordingly, in order to fulfill the legislative goals of section 6403(b)(2), the FCC must protect any licenses and construction permits (and applications therefore) that a broadcaster requires to serve its longstanding over-the-air viewing area, even if these authorizations were not obtained prior to February 22, 2012.

Notably, the Commission’s interpretation of section 6403(b)(2) is not mandated by the plain language of the Spectrum Act. Indeed, section 6403(b)(2) does not state that the Commission must preserve the coverage areas of television stations *licensed by* the enactment of the Spectrum Act. Rather, section 6403(b)(2) focuses on the type of entity that is eligible for preservation of service under the Spectrum Act, namely, “*broadcast licensees*”, i.e., any entity that held a full-power (or Class A) television license as of February 22, 2012.⁴⁶ Had Congress intended to statutorily mandate protection of licensed operations only (as compared to facilities specified in a construction permit (or application therefore) of a broadcast licensee), it would have used language to this effect in the Spectrum Act.

B. The Commission Should Not Interpret The Spectrum Act In A Manner That Would Contravene Legislative Goals For the Full-Power DTV Transition

It would be contrary to the public interest to interpret section 6403(b)(2) as requiring the Commission to take action that would contravene or otherwise inhibit the fulfillment of Congress’s longstanding intent to ensure that all viewers receive a reliable over-the-air digital signal following the DTV transition.⁴⁷ When Congress enacted legislation governing the DTV

⁴⁵ See 156 Cong. Rec. E1471 (daily ed. July 29, 2010) (statement of Rep. Boucher); see also 158 Cong. Rec. S889 (daily ed. Feb. 17, 2012) (statement of Sen. Leahy) (“Broadcast television is critically important to communities across this country . . .”).

⁴⁶ See Spectrum Act, § 6001 (defining the term “broadcast television licensee”).

⁴⁷ This is especially the case given the history of the legislation that led to enactment of the Spectrum Act. See 156 Cong. Rec. E1471 (daily ed. July 29, 2010) (statement of Rep. Boucher) (“To complete the digital television transition successfully, many broadcasters made significant investments in new equipment, including antennas and other items that are tailored to their current channel assignments. Therefore, broadcasters that are required to relocate as part of

transition in 1997, it expressly provided that, in any given market, television stations were not required to cease analog broadcasts until at least eighty-five percent of the households in the market were capable of receiving an over-the-air digital signal.⁴⁸ In this way, Congress indicated its intent to ensure that consumers relying on over-the-air television service would continue to receive over-the-air digital service following the transition.⁴⁹ Even after Congress established February 17, 2009 as the “firm” date by which all television stations must cease analog broadcasts, the initial legislative goal—namely, that no consumer was left without television service following the transition—remained a paramount consideration and ultimately served as the basis of Congress’s decision to delay the DTV transition deadline until June 2009.⁵⁰

Throughout the many years leading to the DTV transition on June 12, 2009, the Commission focused its efforts on fulfilling Congress’s directive that viewers continue to receive over-the-air television broadcast service after the DTV transition. Specifically, the FCC worked

a repacking plan deserve fair compensation for the costs of that relocation. It is also important that the Commission ensure that broadcasters that relocate due to repacking do not lose over-the-air viewers as a result of that move.”); *see also* 158 Cong. Rec. H907, 914 (daily ed. Feb. 13, 2012) (statement of Rep. Walden) (“The bill also provides the best protection of any competing legislation to make sure American viewers can continue to watch programming and news from the Nation’s free, over-the-air broadcasters, who just went through an expensive and difficult federally mandated conversion to digital.”).

⁴⁸ *See* Balanced Budget Act of 1997, Pub. Law 105-33, Title III, § 3003 (amending section 309(j) of the Communications Act of 1934, as amended, to add a new paragraph (14) governing the digital transition).

⁴⁹ *See, e.g.*, 105 H.R. Rep. No. 217, 576-77 (1997) (“Thus, to ensure that a significant number of consumers in any given market are not left without broadcast television service as of January 1, 2007, the conference agreement includes new section 309(j)(14)(B) of the Communications Act which requires the Commission to grant extensions to any station in any television market. . .”); *see also In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 22 FCC Rcd 21064, 21065 (2007) (stating that “Congress intended that the benefits of the digital transition should accrue to all consumers”).

⁵⁰ *See, e.g.*, 155 Cong. Rec. E240-02 (daily ed. Feb. 4, 2009) (statement of Rep. Rangel) (stating that the DTV transition should be delayed because many consumers were unprepared for the transition and explaining that “no one should be left ‘in the dark’ when the transition occurs”).

to develop rules, and to assign to stations technical parameters, that would “permit broadcasters to reach with digital service the audiences they have been serving with analog service so that viewers will continue to have access to the stations that they are accustomed to receiving over the air.”⁵¹ This objective remained a central focus of the Commission as the June 12, 2009 deadline approached. The FCC recognized that certain stations may face difficulties in replicating their full-power analog service areas, and thus adopted rules to facilitate replication.⁵²

However, despite the best efforts of the Commission and the broadcast industry, for certain stations, the replication goal was not fulfilled at the time of the DTV transition. The process of correcting deficiencies in over-the-air digital service resulting from implementation of the FCC’s DTV Table of Allotments has been an ongoing effort, which in many cases is still continuing.⁵³ Due to a number of outside factors, certain stations were unable to license the facilities that represent close approximations of their analog over-the-air viewing areas before

⁵¹ See *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order, 23 FCC Rcd 4220, 4243 (2008); see also *Replacement Translator Order*, 24 FCC Rcd at 5933 (explaining that it is the FCC’s goal that “following the digital transition, all Americans continue to receive the television broadcast service that they are accustomed to receiving to the greatest extent feasible”); *In the Matter of Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service*, Seventh Report and Order and Eighth Further Notice of Proposed Rulemaking, 22 FCC Rcd 15581, 15609 (2007) (“[O]ur overall goal in the DTV transition [is] encouraging replication of analog service.”).

⁵² See *Replacement Translator Order*, 24 FCC Rcd at 5933 (proposing replacement translator service “for the purpose of maintaining broadcast service that the public has come to depend upon and enjoy” and stating that “the goal of this new service is digital replication of full-power analog television service areas”).

⁵³ For example, since June 2009, stations like WABC, WLS, WPVI and WTVD have expended substantial resources to restore service to analog viewers, whether by increasing power beyond the limits prescribed in FCC rules (pursuant to FCC-authorized waivers or interference agreements with affected stations) or through implementing a channel substitution pursuant to the Commission’s rulemaking processes.

enactment of the Spectrum Act.⁵⁴ The failure to protect such facilities would disserve the public interest because many viewers effectively would be relegated to the same positions they were in on June 12, 2009, namely, incapable of receiving a reliable over-the-air digital signal.

C. It Would Contravene The Spectrum Act And Public Policy To Adopt Rules That Would Inhibit Viewers' Ability to Receive VHF Television Stations Or Hinder The Goal Of Encouraging Broadcasters To Relocate From UHF to VHF Channels

The Commission must take particular care in this proceeding not to adopt rules that negatively would impact the ability of broadcasters assigned a post-transition VHF channel to serve the viewers they were serving prior to the DTV transition, or that would inhibit the goal of encouraging broadcasters to relinquish UHF spectrum in exchange for VHF channel allotments. In adopting the Spectrum Act, Congress recognized the inferiority of VHF spectrum for digital broadcasts and thus expressly (1) authorized the Commission to compensate stations that elect to relinquish spectrum in the UHF band in exchange for a channel assignment in the VHF band⁵⁵ and (2) prohibited the Commission from involuntarily relocating a station assigned a UHF channel to a VHF channel, as well as from assigning a low-VHF channel to a station that presently operates with a high-VHF channel.⁵⁶

Given the clear legislative mandate that broadcasters not be involuntarily relegated to inferior VHF spectrum, the Commission must ensure that its rules protect VHF stations. As explained in these Comments, it is particularly important that the Commission protect licenses and construction permits of VHF stations, regardless of the date on which such permits were authorized or for which they were applied. In the absence of such protection, VHF stations effectively will be constrained to operating parameters as of February 22, 2102, notwithstanding

⁵⁴ See *infra* Section III (setting forth why it is appropriate to provide protection to construction permits authorized to (i) effectuate a channel substitution order, and (ii) facilitate replication of over-the-air analog viewing areas in the New York DMA).

⁵⁵ See Spectrum Act, § 6403(a)(2)(B).

⁵⁶ See *id.* § 6403(b)(3).

that in many cases these operating parameters were not yet sufficient to resolve viewers' reception challenges.⁵⁷

Importantly, in light of the Commission's recognition that VHF spectrum is technically inferior, the Commission should adopt rules aimed at ensuring that VHF spectrum is suitable for television broadcasts following the incentive auction. To this end, the Commission must authorize any station assigned a VHF channel after the repacking to operate and receive interference protection at technical parameters that replicates its over-the-air viewership at the start of the incentive auction process.⁵⁸ In the absence of such rules (and other modifications to

⁵⁷ Indeed, it has been the experience of several of the ABC Owned Television Stations, including WABC, WPVI, WTVD, WLS and KABC, that full replication of analog over-the-air service using a VHF channel simply has not been possible to date. Indeed, although it previously was believed that viewers of VHF stations would not be impacted by a change from analog to digital transmissions, it is now well-known that digital modulation format 8VSB does not enable stations with VHF channel assignments to serve their viewers with a reliable over-the-air digital signal on a continuous basis, particularly for those viewers that reside in urban markets, like those served by the ABC Owned Television Stations.

⁵⁸ This is particularly important with respect to stations that were assigned VHF channels as their post-DTV transition channels and have worked earnestly and diligently to restore service to analog viewers. For these stations, in particular, the Commission must provide flexibility to obtain the requisite authorizations to implement modifications that will enable complete replication of their former analog over-the-air viewing areas. Indeed, as has been described in these Comments, WABC, WLS, WPVI, and WTVD have been working for over three years to restore over-the-air service to their viewers. Despite their efforts, none of these stations has been able to replicate fully their analog viewing areas and, even today, the stations continue to receive complaints from viewers indicating that they cannot consistently receive a reliable over-the-air digital signal.

Although these stations have taken all steps within their control to restore service, further modifications are precluded under the Commission's technical rules governing power levels and interference. *See supra* note 36 and accompanying text; *see also* Reply Comments of The Walt Disney Company to the *Notice of Proposed Rulemaking* in ET Docket No. 10-235, at 5, 10-11, 13 (filed Apr. 25, 2011). Notably, this situation is not limited to stations that operate on VHF channels on the east coast, but also extends to VHF broadcast operations in other major urban areas, such as Los Angeles. In the weeks following the DTV transition, KABC, for example, received many more calls from viewers reporting reception problems than stations in the market that were assigned UHF channels. KABC continues to receive reception complaints even today, though the number of calls has decreased from those received in June 2009. KABC believes that the reason for this reduction in calls is two-fold. First, certain viewers likely no longer call the station because they either have implemented alternative means to receive the station (or have

the Commission's technical rules to improve VHF for television broadcasts), broadcasters will have little incentive to elect to relinquish UHF channels to relocate to technically-inferior VHF channels.⁵⁹

D. It Is Contrary To The Public Interest To Specify February 22, 2012 As The Cut-Off Date For Protection Because Stations Lacked Notice That Facilities Authorized or Applied For After This Date Would Not Receive Protection

At the time the Spectrum Act was enacted, television stations had no notice that they would not receive protection for licenses or construction permits authorized or applied for after February 22, 2012. Rather, enactment of the Spectrum Act merely provided broadcast television licensees with assurances that, at a minimum, entities holding a license for a full-power television station as of February 22, 2012 were eligible for protection.⁶⁰ As the FCC itself acknowledges, the Spectrum Act authorizes it to protect television facilities as necessary to serve the public interest.⁶¹ Accordingly, it was not clear until release of the *NPRM* that the FCC would

switched to another station for local news and information) or have simply stopped calling out of frustration. Second, in mid-2011, KABC increased its power to 28.7 kW ERP, the highest power level permissible under FCC rules without causing interference to stations in adjacent markets. This increase in power likely has alleviated the reception difficulties of some viewers. However, although KABC still does not broadcast with adequate power to fully replicate its over-the-air analog viewing area, it has been unable to secure the agreement of other stations to accept interference that would result from a further increase in KABC's power.

In short, the Commission should ensure that its rules governing the repacking do not preclude stations like WABC, WPVI, WTVD, WLS, and KABC from implementing modifications that would enable them to provide reliable over-the-air digital signals to their former analog viewing area on an ongoing basis.

⁵⁹ For example, VHF channels (particularly low-VHF channels such as channel 6 which is assigned to WPVI) are extremely sensitive to interference from man-made noise (*e.g.*, neon signs, compressors, industrial machines, digital devices and other industrial, commercial, and residential contributors) that exists in urban markets. Whereas interference in an analog environment did not render a picture "unviewable", this is not the case with digital television.

⁶⁰ See Spectrum Act, § 6403(b)(2); *supra* Section II.A (explaining that the plain language of the Spectrum Act does not mandate the interpretation advanced by the Commission).

⁶¹ See *Incentive Auction NPRM* ¶ 113 ("[W]e do not interpret [section 6403(b)(2)] to prohibit the Commission from granting protection to additional facilities where appropriate.").

propose to deny protection to licenses and construction permits authorized or applied for after February 22, 2012.⁶²

Notably, despite its proposal to protect only the licensed parameters of stations as of February 22, 2012, the FCC has not, in fact, implemented a freeze on applications to modify full-power television facilities until it adopts rules governing the incentive auction and repacking process.⁶³ Rather, since enactment of the Spectrum Act, the FCC not only has continued to accept and process applications for modifications to full-power television facilities,⁶⁴ it also has granted license and construction permit applications without conditioning the grants upon the outcome of the incentive auction and repacking process, thereby providing licensees with no

⁶² See, e.g., *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, Report and Order, 14 FCC Rcd 12559, 12630 (1999) (stating that the cut-off date for grandfathering of attributable joint sales agreement was reasonable where affected parties were on notice that the date of adoption of an order proposing a rule would serve as the cut-off date).

⁶³ By contrast, the Commission implemented a freeze on the filing of applications for broadcast facilities on channel 51 in anticipation of a rulemaking aimed at making UHF spectrum available for wireless services. See *General Freeze on the Filing and Processing of Applications for Channel 51 Effective Immediately and Sixty (60) Day Amendment Window for Pending Channel 51 Low Power Television, TV Translator, and Class A Applications*, Public Notice, 26 FCC Rcd 11409 (MB 2011). Historically, the FCC imposes a freeze when it determines that it is in the public interest to impose a freeze upon the acceptance, processing, or action upon applications seeking to operate using spectrum that is the subject of a rulemaking to change license service rules or spectrum allocations.

⁶⁴ Thus, even release of the *NPRM* cannot be said to have served as notice that construction permits and licenses authorized or applied for after October 2, 2012 would not receive protection given that the Commission has continued to accept, process and, in some cases, authorize modifications without the imposition of any conditions after its release. For example, an application filed by KFSN to modify its facilities to increase its power slightly from 260 kW to 400 kW was accepted for filing on December 7, 2012, more than two months after release of the *NPRM*. Assuming the Commission determines that the facilities proposed in this application satisfy FCC rules as presently in effect, the FCC should preserve the coverage area of, and population served by, the proposed KFSN facilities.

notice or expectation that the facilities authorized by these grants would not receive protection.⁶⁵ As a result, not only have broadcast stations expended technical, financial, and other resources to implement modifications in reliance on the approvals authorized by the Commission, the viewers of these stations have benefited from such modifications. Adoption of the FCC's proposal to establish February 22, 2012 as the "cut-off" for protection would effectively constitute a *de facto* freeze, which freeze would be applied retroactively to deny broadcasters—and their viewers—the benefits of facilities modifications that were implemented to valid FCC authorizations issued pursuant to final Commission actions.⁶⁶

III. THE COMMISSION SHOULD PROTECT CONSTRUCTION PERMIT APPLICATIONS AND AUTHORIZATIONS OF FULL-POWER VHF STATIONS SEEKING TO REPLICATE THEIR LONG-STANDING VIEWING AREAS

Although the FCC proposes in the *NPRM* to protect only those facilities licensed as of February 22, 2012, the Commission does, in fact, recognize that many full-power stations have applications or construction permits to modify their facilities, and that it may be appropriate under the Spectrum Act to protect the proposed modifications.⁶⁷ As an initial matter, Disney believes that protection of construction permits is in the public interest because it is the construction permit process—and not the licensing process—that establishes a station's coverage area, population served and rights to interference protection. Moreover, it would be arbitrary and capricious to protect construction permits for digital Class A facilities (while simultaneously

⁶⁵ See, e.g., FCC File No. BPCDT-20120216ADO. This approach is contrary to that taken in the full-power digital transition, where the FCC expressly included DTV transition-related conditions on the faces of the construction permits. See, e.g., FCC File No. BPCDT-20080208ADW (conditioning grant of construction permit on requirement that facility not be operated prior to specified date).

⁶⁶ See 47 C.F.R. § 1.115 (providing thirty days from the date of public notice of an action for any person aggrieved by any action taken pursuant to delegated authority to file an application for review); *id.* § 1.117 (allowing forty days after public notice of any given action for the Commission to review the proceeding on its own motion).

⁶⁷ See *Incentive Auction NPRM* ¶ 114.

denying protection to full-power construction permits and applications intended to restore service to over-the-air analog viewers) because the rationales for protection of digital Class A facilities apply equally to full-power stations that were unable to fulfill the replication goal using facilities with the technical parameters assigned to them by the FCC. In particular, Disney urges the Commission to protect full-power construction permits required to effectuate a channel change necessitated by the DTV transition, and those obtained to implement interference agreements intended to facilitate replication of over-the-air analog viewing areas, particularly in the New York DMA. It also is critical that the Commission protect repacked stations that operate digital facilities in excess of the power limits set forth in the FCC's rules in order to replicate their over-the-air analog viewing area.

A. Protection of Construction Permits Is Consistent With Commission Rules and Policies

The Commission's focus on licensed facilities is misguided as it fails to recognize that, pursuant to the FCC's rules and policies, it is the construction permit process—not the licensing process—that establishes the substantive terms of a station's proposed operation. In other words, a station's coverage area and population served, as well as its rights to interference protection, are determined at the time it obtains a construction permit.⁶⁸ Grant of a construction permit application demonstrates that the Commission has made an affirmative determination that a proposed facility modification is in the public interest. By contrast, the licensing process is largely administrative in nature in that stations filing license applications are not proposing

⁶⁸ See, e.g., *In the Matter of Amendments of Parts 73 and 74 of the Commission's Rules To Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12375 (1997) ("A construction permit application serves as an engineering blueprint of the proposed facility, which can be examined by the staff and other parties to ascertain compliance with the Commission's rules and policies prior to any construction. Thus, the construction permit assures Commission approval for the facilities specified therein, and those facilities are protected from later-filed conflicting applications.").

changes in operations but rather are certifying to the FCC that a facility has been built in conformance with previously approved and FCC-authorized technical parameters.⁶⁹ Thus, for purposes of determining the type of broadcast facility that should be protected in the repacking process, the FCC should focus on whether a station has obtained, or filed an application for, a construction permit, and not on whether a station has licensed its facilities.⁷⁰

B. It Is Arbitrary And Capricious To Afford More Protection To Construction Permits For Class A Digital Facilities Than To Full-Power Stations Seeking To Replicate Over-The-Air Analog Viewing Areas

In the *NPRM*, the Commission proposes to deny protection to construction permits for full-power stations while, at the same time, proposing to protect construction permits for digital Class A facilities, whether such permits have been authorized or are the subject of applications pending before the Commission.⁷¹ To support its proposal, the FCC reasons that failing to protect digital Class A construction permits would be “fundamentally unfair” because Class A licensees relied on previously adopted Commission rules to develop their digital construction

⁶⁹ See *id.* (“On the other hand, a license application covers facilities which have already been constructed and in most cases are already operating. The staff does not perform interference or coverage studies in a license application, as it would for a construction permit application. The staff simply performs a brief review of the license application to confirm that the actually constructed facilities match the construction permit or former license, as appropriate. Usually, no determination of compliance with Commission rules and policies is required at the license application stage, since those determinations were made prior to grant of the construction permit.”).

⁷⁰ Such an approach is consistent with prior Commission precedent governing the full-power digital transition. Specifically, following enactment of the Balanced Budget Act of 1997, which legislated the DTV transition, the Commission concluded that it would provide interference protection for construction permits as well as licensed broadcast facilities, reasoning that “most holders of construction permits are sufficiently advanced in the licensing process that it would be inequitable to rescind their permits.” See *In the Matter of Reallocation of Television Channels 60-69, The 746-806 MHz Band*, Report and Order, 12 FCC Rcd 22953, 22969 (1997).

⁷¹ See *Incentive Auction NPRM* ¶ 115 & n.170 & 175. The Commission further proposes to permit Class A licensees to file applications for digital construction permits until a date to be established by the Media Bureau, and states that it will protect these not-yet-applied for facilities in the repacking. See *Incentive Auction NPRM* at n.175.

plans.⁷² The FCC also concludes that the failure to preserve the coverage areas of construction permits for digital Class A facilities would “deprive the public of important benefits of the Class A DTV transition.”⁷³ As explained below, these rationales apply equally to construction permits for full-power television stations (and applications there for) that would restore or improve service to viewers adversely impacted by the DTV transition.

First, as is the case with Class A stations, it would be fundamentally unfair to fail to protect full-power facilities constructed in reliance on long-standing Commission rules and policies aimed at fulfilling the fundamental objective of the DTV transition. For example, as explained above, in June 2009, WLS and WABC implemented facilities pursuant to technical parameters assigned to them by the FCC but these facilities did not replicate their respective over-the-air analog viewing areas. In the several years since the transition, both stations have worked earnestly and diligently, and have expended significant resources to obtain construction permits and other authorizations (*e.g.*, local zoning permits, interference agreements with other in-market stations, etc.) necessary to construct facilities that would enable them to more closely meet the FCC’s replication goal. Although the stations’ license applications were not filed before the proposed February 22, 2012 “cut-off” for protection, the stations made their plans—and filed the requisite applications—based on rules and policies in existence well before this date. Under these circumstances, it would be inequitable to deny protection to construction permits for stations like WLS and WABC.⁷⁴

The failure to protect facilities like those operated by WABC and WLS “would deprive the public of important benefits” of the full-power DTV transition, just as the FCC believes

⁷² See *id.* ¶ 115.

⁷³ See *id.*

⁷⁴ This is the case even though WABC’s construction permit application (which was filed prior to enactment of the Spectrum Act) was not granted until after February 22, 2012. See *supra* text accompanying note 14.

would be the case were it to deny protection to Class A digital construction permits (or applications therefore). Because many viewers could not receive an over-the-air signal from stations operating on VHF channels at the time of the DTV transition, these viewers could not benefit from the DTV transition until such time as the affected stations obtained FCC authorizations to implement facilities modifications aimed at improving reception of their signals. For example, by commencing broadcasts with its channel 44 facility, WLS has dramatically improved viewers' ability to receive a signal using an indoor antenna, and also has improved outdoor reception to the Chicago DMA. Similarly, by constructing the facilities authorized by the FCC pursuant to complicated multi-party interference agreements, WABC has significantly improved service to its viewers in the New York DMA, thereby enabling these viewers to experience the full benefits of the DTV transition. Failing to protect the coverage areas and populations served by these stations—notwithstanding that the facilities only recently were licensed—would disserve the public interest by essentially placing viewers who were receiving over-the-air service prior to the DTV transition in the same position they were in at the time of the DTV transition—namely, without the ability to receive a reliable over-the-air digital signal.⁷⁵

⁷⁵ This also is the case with respect to stations like WPVI that have filed applications for construction permits to increase power to improve over-the-air digital service to former analog viewers. Specifically, in June 2012, WPVI filed an application for a construction permit to increase its power to 62.9 kW in order to resolve remaining problems with reception of WPVI's signal, many of which appear to result from lack of sufficient signal level at many viewers' locations. *See* FCC File No. BPCDT-20120604AEC. As indicated in this application, WPVI believes that the proposed power increase will alleviate the vast majority of the reception problems and thereby enable it to replicate its former over-the-air analog viewing area. There is no rational reason to deny protection to such a construction permit application in light of the FCC's proposal to permit Class A stations to elect to protect digital facilities that have not yet been applied for. *See Incentive Auction NPRM* at n.175.

C. The FCC Should Protect Construction Permits Required to Effectuate a Channel Change Necessitated by the DTV Transition

In the *NPRM*, the Commission specifically seeks comment on whether to “protect outstanding construction permits issued to effectuate a channel substitution following a rulemaking proceeding.”⁷⁶ As explained below, Disney believes that such construction permits absolutely should receive protection during the incentive auction process.

Stations that have obtained construction permits following a rulemaking proceeding have done so in reliance on, and in compliance with, existing FCC rules and policies. Thus, it would be “fundamentally unfair” to fail to protect the facilities specified in such construction permits, even if the facilities were not licensed until after the enactment of the Spectrum Act.⁷⁷ Indeed, this is the case with WLS. As explained above, WLS was particularly hard-hit by the DTV transition, and, after exploring several options, determined that relocating to channel 44 would enable it to improve materially its over-the-air digital service to viewers.⁷⁸ In reliance on the Media Bureau’s decision to amend the DTV table of allotments in a rulemaking proceeding,⁷⁹ WLS expended significant resources and time to design, implement and construct digital facilities on channel 44.⁸⁰ WLS ultimately filed a license to cover its channel 44 facility on October 16, 2012, which not only was the earliest date possible given the complicated nature of the construction project but also was completely within the construction time period specified on the face of the construction permit issued by the Media Bureau approximately two and a half

⁷⁶ *Incentive Auction NPRM* ¶ 116.

⁷⁷ *See supra* Section III.B (discussing application of the Commission’s rationales for protecting Class A digital facilities to full-power television stations).

⁷⁸ *See supra* notes 18-20 and accompanying text.

⁷⁹ *See supra* note 20 and accompanying text.

⁸⁰ *See supra* Section I.B (discussing construction of WLS’s channel 44 facility).

years *before* enactment of the Spectrum Act.⁸¹ It would be arbitrary and capricious to fail to protect these facilities—which were constructed in compliance with the FCC’s rules governing channel substitutions—simply because a license application for the facilities was not on file on February 22, 2012.⁸² This is especially the case given that operation of these facilities has resulted in substantial improvements in WLS’s ability to deliver a reliable and receivable over-the-air digital signal to its viewers.⁸³

Importantly, as the Commission recognizes, there are fewer than twenty outstanding construction permits for channel substitutions.⁸⁴ Accordingly, adopting rules to protect construction permits issued to effectuate a channel substitution rulemaking proceeding would not have a significant impact on the Commission’s flexibility in the repacking process and thus would be consistent with the FCC’s goal of balancing the interests of broadcasters against the need to make additional spectrum available for wireless uses.⁸⁵

D. The FCC Should Recognize And Protect the Coverage Areas Of Stations That Are Parties To Interference Agreements That Facilitate Replication Of Over-the-Air Analog Viewing Areas In The New York DMA

As the Commission is well-aware, viewers in the New York DMA have faced significant difficulties with indoor reception of DTV signals.⁸⁶ Through the use of privately negotiated interference agreements, stations like WABC have been able to overcome some of these

⁸¹ See BPCDT-20091001ACI. WLS subsequently filed an application to modify the facilities specified in the October 2009 construction permit. See FCC File No. BMPCDT-20110331ABW (granted on Aug. 16, 2012).

⁸² See *supra* Section III.A.

⁸³ See *supra* Sections I.B and II.B.

⁸⁴ *Incentive Auction NPRM* at n.177.

⁸⁵ See *Incentive Auction NPRM* ¶ 10 (“Our central goals are to repurpose the maximum amount of UHF band spectrum for flexible licensed and unlicensed use in order to unleash investment and innovation, benefit consumers, drive economic growth, and enhance our global competitiveness, while at the same time preserving a healthy, diverse broadcast television service.”).

⁸⁶ See *supra* text accompanying note 10.

challenges. Thus, as explained herein, it is imperative that the Commission adopt rules to protect the coverage areas of stations that are parties to such privately negotiated interference agreements.

Recognition of interference agreements executed by stations serving the New York DMA is of particular importance given the unique nature of this market. The New York DMA is the only television market where many television stations were required to relocate broadcast operations as a result of 9/11.⁸⁷ For example, following 9/11, many stations in the New York DMA were forced to relocate to facilities with lower antenna structures and thereby were required to operate at higher powers in order to compensate for the decrease in antenna height. Moreover, as the FCC is well-aware, the New York DMA is one of the most congested markets in the country, where coverage has always been restricted by potential interference to nearby co-channel and adjacent station operations.

Due to spectrum constraints in the New York DMA and the limitations under the FCC's rules regarding, *inter alia*, interference and power levels for VHF stations, WABC was assigned technical parameters for its post-DTV transition operations that simply did not permit it to provide reliable over-the-air digital service to its viewers.⁸⁸ As a result, WABC has been working continuously since June 2009 to address viewer reception problems, primarily by negotiating two complicated interference agreements with other broadcast stations.⁸⁹ In reliance on the FCC's recognition of such interference agreements, WABC has paid a total of almost \$500,000 in reimbursable expenses to three of the stations pursuant to the agreements. One of these interference agreements, which was executed in January 2012 after many months of negotiation, contemplated power increases by stations near the Canadian border. Accordingly,

⁸⁷ See *supra* notes 7-8 and accompanying text.

⁸⁸ See *supra* Section I.A (discussing WABC's experiences in the DTV transition).

⁸⁹ See *supra* notes 11-15 and accompanying text.

WABC's construction permit application (which was filed prior to enactment of the Spectrum Act) could not be acted upon until Canadian coordination was complete.⁹⁰ In other words, although WABC relied on existing FCC processes and rules to enter into interference agreements (which required significant financial expenditures) and file the requisite applications to resolve reception problems faced by its viewers as a result of the DTV transition, due to circumstances beyond its control, it simply was unable to license its presently authorized facilities prior to enactment of the Spectrum Act.⁹¹

Importantly, recognition and protection of facilities that are the subject of interference agreements such as those entered into by WABC would be consistent with the FCC's policies governing interference agreements. The FCC historically has permitted stations to negotiate to accept interference from other stations and generally has refrained from interfering in such negotiations.⁹² For example, the FCC encouraged such negotiations at the time of the DTV transition as a means to resolve channel conflicts between and among broadcast stations.⁹³ Moreover, in the *NPRM*, the FCC appears poised to permit stations to agree to accept

⁹⁰ See *supra* note 14 and accompanying text.

⁹¹ See *supra* Section I.A.

⁹² See, e.g., *In the Matter of Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands*, Report and Order and Order of Proposed Modification, WT Docket Nos. 12-70 & 04-356; ET Docket No. 10-142, at 51 (rel. Dec. 17, 2012) ("The Commission generally supports the actions of licensees to resolve interference issues raised by other spectrum holders or users through private agreements. . . .").

⁹³ See, e.g., *In the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, Report and Order, 19 FCC Rcd 18279, 18302 & n.108 (2004) (adopting rules that enabled licensees to resolve channel conflicts by privately negotiating interference agreements pursuant to which they agreed to accept interference or reduce facilities).

interference in order to participate in the reverse auction.⁹⁴ Simply by making this proposal, the FCC is furthering its well-established policy of recognizing the importance of interference agreements. Under these circumstances, it would be arbitrary and capricious to deny protection to stations that have entered into interference agreements based on long-standing Commission policies.⁹⁵ It also would be pecuniary and unfair not to honor interference agreements entered into by stations like WABC who have expended considerable money to reimburse affected stations for their corresponding power increases in reliance on these Commission policies.

E. The Commission Should Protect the Coverage Areas of Stations Facilities Whose Operations Exceed the ERP Limits Where Such Power Increases Facilitate Replication of Analog Viewing Areas

In the *NPRM*, the FCC proposes in a footnote to “make all reasonable efforts to preserve the existing coverage areas of stations whose operations exceed the antenna height (but not the ERP) limits.”⁹⁶ Disney urges the Commission to reconsider this proposal and instead adopt rules that seek to protect coverage areas of stations operating at power levels in excess of those permitted under the rules, particularly those operating on VHF channels like WABC, WPVI, and WTVD. The FCC is statutorily obligated under the Spectrum Act to protect coverage areas and

⁹⁴ See *Incentive Auction NPRM* ¶ 87 (seeking comment on whether to permit broadcast licensees to bid to accept additional interference from other broadcast stations).

⁹⁵ While interference agreements among stations in the New York DMA are essential to remedy the unique challenges to replicating over-the-air analog service, it also is imperative that the Commission adopt rules that do not negate the validity of privately-negotiated interference agreements that facilitate replication of over-the-air analog service in other markets. For example, the execution of interference agreements was a critical step in WTVD’s ability to license the facilities required to replicate its over-the-air analog audience. See *supra* Section I.D. Similarly, by entering into an interference agreement, WPVI has been able to file an application to increase its power to the level it believes necessary to serve its viewers with a reliable over-the-air digital signal. See *supra* at note 75.

⁹⁶ See *Incentive Auction NPRM* at n.157. It is not clear whether this proposal applies only to UHF channels assigned new channels in the repacking process, or whether the proposal is intended to apply more broadly to all stations affected by the repacking. Thus, Disney is addressing the proposal to ensure that the Commission does not take any action that could adversely impact the ability of the ABC Owned Television Stations to serve their existing viewers with an over-the-air digital signal.

populations served by broadcast licensees, without regard to whether such coverage areas and populations served are the result of a waiver of the FCC's rules governing power limits.⁹⁷ Moreover, the Commission has expressly recognized the positive impact of power increases on VHF reception as well as the important role VHF spectrum will play with respect to the provision of DTV service following the incentive auction process.⁹⁸ Under these circumstances, it would be arbitrary and capricious for the Commission to deny protection to the coverage areas of stations whose operations exceed the power limits set forth in the FCC's rules. This is particularly the case given that the FCC has failed to provide any justification in the *NPRM* as to why it is reasonable to provide special treatment to operations pursuant to a waiver of the antenna height rules (but not the ERP limits), notwithstanding that both antenna height and power levels impact the coverage areas of broadcast stations.⁹⁹ In short, there is no rational

⁹⁷ See Spectrum Act, §6403(b)(2). The FCC appears to recognize this mandate in its proposal to preserve, at a minimum, the coverage areas and populations served by facilities licensed as of February 22, 2012. See, e.g., *Incentive Auction NPRM* ¶ 98. Notwithstanding this clear directive, the FCC, without discussion, appears to propose that, for purposes of determining a station's replication coverage in the repacking process, it will not consider operations in excess of the power limits, even when such operations have been authorized by the Commission pursuant to a waiver of its rules. See *Incentive Auction NPRM* at n.157.

⁹⁸ See *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16514 (2010) ("*Initial Broadcast Spectrum NPRM*") (stating that a VHF power increase "provides some level of improvement in reception of VHF television service"). This has been the experience of the ABC Owned Television Stations. As explained in these Comments, the ABC Owned Television Stations operating on the east coast, in particular, were unable to provide reliable digital service following the transition, due to the technical parameters assigned to the stations for their post-transition digital operations using VHF spectrum, the propagation characteristics of which "have posed challenges for their use in providing digital television service." See *Initial Broadcast Spectrum NPRM*, 25 FCC Rcd at 16511. These television stations and others similarly situated to the ABC Owned Television Stations were able to resolve certain of these challenges by obtaining waivers of the FCC rules setting forth the maximum power limits for VHF stations and, as a result, were able to provide incremental improvements in reception of over-the-air digital service.

⁹⁹ It is a basic tenet of administrative law that the FCC must provide a reasoned basis for its actions, particularly when it proposes to reverse long-standing policies, such as those governing power changes necessary to improve service to former over-the-air analog viewers.

basis for the Commission's one-sided proposal, which, if adopted, would unfairly discriminate against stations in large urban markets that often can only improve coverage through power increases.¹⁰⁰

IV. THE COMMISSION MUST ENSURE THAT REPACKED STATIONS CAN PROVIDE RECEIVABLE OVER-THE-AIR DIGITAL SERVICE TO THEIR ACTUAL VIEWERS

In the *NPRM*, the Commission sets forth three alternative approaches to satisfy its statutory obligation under section 6403(b)(2) to preserve the populations served by television broadcast stations impacted by the repacking process.¹⁰¹ It is imperative that, whichever approach ultimately is adopted, the Commission ensure that stations that do not elect to participate in the incentive auction are not harmed in any way; any reduction in a station's service area due to additional interference effectively would amount to an involuntary relinquishment of spectrum rights and thus contravene Congress's mandate that the incentive auction process be voluntary.¹⁰²

Regardless of the interference standard that ultimately is adopted, the Commission should take into account a station's actual audience in order to avoid any service losses to viewers.

Calculating interference on a percentage basis, without regard to actual audience, has a

See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (holding that an agency must provide a reasoned analysis as a prerequisite to reversing a well-established rule or policy). Stations that have relied on a rule waiver to serve pre-transition over-the-air audiences should not be penalized now by a change in policy that would preclude their viewers from receiving a reliable signal, a result that is clearly contrary to the public interest.

¹⁰⁰ For example, in urban markets, stations are constrained in their ability to operate at higher antenna heights because there often exists a finite number of sites from which to broadcast, and these sites frequently are shared by multiple broadcasters.

¹⁰¹ *See Incentive Auction NPRM* ¶¶ 103-08.

¹⁰² *See* Spectrum Act, § 6403(a) (requiring implementation of reverse auction for broadcasts that *voluntarily* elect to relinquish spectrum rights); *id.* § 6403(b)(3) (prohibiting *involuntary* relocations from UHF to VHF); *see also* Comments of the National Association of Broadcasters to the *Notice of Proposed Rulemaking* in GN Docket No. 12-268, at Section III.C (filed Jan. 25, 2013) ("NAB Comments") (explaining that "it would undermine the very concept of *voluntary* if a station's alternative to participation was an uncertain future involving a forced relocation to another channel that might cause it greater interference").

disproportionate and unfair effect on stations that serve large markets. Any amount of new interference on a percentage-basis is likely to have a material impact on a station operating in a congested market such as New York or Philadelphia. For example, allowing an increase in interference by as little as one percent would have a dramatic impact on WABC, as this seemingly small percentage equates to 200,000 people in the New York DMA. By contrast, in a small market, one percent new interference would impact only a very small number of actual viewers and, in many cases, may impact no viewers at all due to the rural nature of the market. Thus, unless the Commission adopts an interference standard that considers a station's actual viewing audience (rather than a percentage-based approach), stations in larger markets are certain to be involuntarily and negatively affected by the incentive auction process even though they have elected not to relinquish their spectrum assets in the auction.

V. THE COMMISSION SHOULD CAREFULLY EVALUATE THE IMPACT OF THE REPACKING ON EXISTING VIEWERS AND MUST AFFORD ADEQUATE TIME TO CONSTRUCT REPACKED FACILITIES

In the *NPRM*, the Commission asks whether it would be reasonable to require all stations subject to the repacking to construct the facilities on their newly assigned channels in eighteen months.¹⁰³ As the FCC appropriately recognizes, there are significant tasks involved in constructing a new facility, such as the need to engineer and order equipment for a new facility, avoid potential weather issues, and coordinate with other stations.¹⁰⁴ Although it is possible that certain stations can construct their facilities quickly and within the proposed eighteen-month timeframe, the FCC underestimates the amount of time involved in constructing facilities in major urban markets.

¹⁰³ See *Incentive Auction NPRM* ¶ 322.

¹⁰⁴ See *id.* ¶ 312.

A. The Commission Should Spend Adequate Time And Resources To Ensure That The Repacking Is Completed Efficiently And With Minimal Negative Impact On Viewers

As an initial matter, the FCC is correct to look to the DTV transition for guidance with respect to the appropriate timeframe for construction of new facilities. However, it is important to note that, in the DTV transition, the FCC took several steps over a number of years which ultimately culminated in its initiation of a rulemaking to obtain information and develop the record necessary to establish rules and determine the technical parameters for stations transitioning to digital broadcast, and to adopt the final DTV table of allotments.¹⁰⁵ Importantly, the Commission provided all broadcast stations with the opportunity to provide comments on the technical parameters proposed for their individual operations, including whether the proposed parameters likely would replicate over-the-air analog service.¹⁰⁶ In response to extensive comments received by broadcasters in at least two rounds of comments, prior to adopting the final DTV table of allotments in March 2008,¹⁰⁷ the FCC in many cases modified the technical parameters from those initially proposed nearly eighteen months earlier, in October 2006.¹⁰⁸

¹⁰⁵ For example, as early as 2004, the Commission adopted rules to implement the channel election process which served as the foundation for the final DTV table of allotments. *See In the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18279 (2004).

¹⁰⁶ *See In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Seventh Further Notice of Proposed Rulemaking, 21 FCC Rcd 12100 (2006) (“*Seventh Further Notice*”) (seeking comment on initial DTV table of allotments); *see also In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Seventh Report and Order and Eighth Further Notice of Proposed Rule Making, 22 FCC Rcd 15581, 15583 (2007) (“*Seventh Report and Order*”) (seeking comment on revisions to the table of allotments that were proposed during the comment cycle for the *Seventh Further Notice*).

¹⁰⁷ The Commission initially adopted the “final” DTV Table of Allotments in August 2007. *See Seventh Report and Order*, 22 FCC Rcd at 15583. However, it later revised the final DTV Table of Allotments in response to petitions for reconsideration of the *Seventh Report and Order*, as well as to respond to requests to revise the table of allotments that could not be addressed in that order due to their late submission. *See Memorandum Opinion and Order on*

Notwithstanding the diligent efforts of the Commission to develop a DTV table of allotments that would enable broadcasters to replicate analog service, as the FCC is aware, the DTV transition demonstrated that stations in the northeast, Chicago and other of the nation's largest markets faced substantial difficulties replicating their former analog viewing areas. This is likely to be the case with respect to repacking in the incentive auction process as well, given that the markets where accomplishing replication was the most difficult are the same markets where spectrum needs are the greatest and a substantial amount of repacking very likely will be required.

While it is true that the repacking likely will not require every station to relocate facilities as the DTV transition did, the repacking nevertheless will have a significant impact on the broadcast industry. It has been estimated that at least 500 stations will have to be relocated involuntarily to accommodate the repacking.¹⁰⁹ Moreover, the Commission is seeking to complete the incentive auction process in a very short amount of time, by 2014.¹¹⁰ It simply will not be possible for all of these stations to relocate to new facilities within eighteen months, especially where stations will have had little to no input regarding the technical parameters for their repacked facilities.¹¹¹ At a minimum, the Commission should afford affected stations with

Reconsideration of the Seventh Report and Order and Eighth Report and Order, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 4220 (2008).

¹⁰⁸ See *Seventh Further Notice*, 21 FCC Rcd at 12105; see, e.g., *Seventh Report and Order*, 22 FCC Rcd at 15583 (“The new DTV Table is the result of informed decisions made by eligible licensees and permittees during the Commission’s channel election process.”).

¹⁰⁹ See NAB Comments, *supra* note 102, at 9, 49.

¹¹⁰ See *Incentive Auction NPRM* ¶ 10.

¹¹¹ See *id.* ¶ 322 (“Unlike stations in the digital transition, stations assigned to new channels as a result of the reorganization authorized by the Spectrum Act will not have the benefit of years of preparation and experimentation, nor will they have the ability to operate both pre- and post-transition channels.”); see *supra* notes 106-108 and accompanying text (explaining that the technical parameters proposed by the FCC in the initial DTV table of allotments were changed in response to comments from broadcasters demonstrating that the proposed technical parameters were inadequate to facilitate replication).

a meaningful opportunity to comment on proposed technical parameters for their repacked facilities, as well as provide an adequate amount of time to construct repacked facilities.

B. Eighteen Months Is An Inadequate Amount Of Time For A Station In A Major Urban Market To Transition To A New Channel

With respect to the relevant timeframe to construct repacked facilities, in particular, the experiences of the ABC Owned Television Stations during the DTV transition demonstrate that eighteen months is insufficient to enable a station located in a major urban market to transition to a new channel. In Chicago, Illinois, for example, WLS required the full three-year period under the FCC's rules to build its digital facility on channel 44.¹¹² WLS simply could not erect a new antenna atop the tallest building in the western hemisphere (a building WLS does not own or control) without significant input from building engineers, and in full compliance with the building owner's rules and policies governing broadcast operations from the Willis Tower. Moreover, WLS was required to obtain certain permits from the city of Chicago to facilitate construction of its channel 44 facility, including, *inter alia*, permits to authorize the closure of at least two city blocks as well as the use of a helicopter.¹¹³ It is highly unlikely, given the need for governmental approvals and extensive coordination of construction projects of broadcasters in major urban markets, that repacked facilities could be constructed in as little as eighteen months.¹¹⁴

¹¹² Construction of WLS's channel 44 facility involved the typical issues involved in construction of a broadcast facility (*e.g.*, procurement and installation of a new antenna and transmission line) as well as ongoing coordination with engineers at the Willis Tower and the city of Chicago. *See supra* notes 22-24 and accompanying text; *see also supra* note 18.

¹¹³ The helicopter lift required optimal weather and could not have occurred in the presence of the high winds that Chicago often experiences. Indeed, as discussed above, it proved extremely challenging to find the right combination of weather (*i.e.*, winds below twenty miles per hour at the antenna height authorized by the FCC for the channel 44 antenna) and helicopter availability. *See supra* note 24.

¹¹⁴ Similar to WLS, stations like KGO-TV would experience substantial challenges if the FCC adopts an eighteen-month construction period. For example, the construction of digital

VI. THE FCC SHOULD PROVIDE REPACKED STATIONS WITH DISCRETION TO TARGET AUDIENCES AND DETERMINE HOW BEST TO EDUCATE VIEWERS

The FCC seeks comment in the *NPRM* on the approach that should be taken towards educating consumers that may be affected by the repacking process, including whether stations that are assigned a new channel in the repacking should be required to air viewer notifications and, if so, the form such notifications should take and when the notifications should be broadcast.¹¹⁵ Disney encourages the Commission to provide broadcast stations with maximum flexibility and discretion to determine how best to notify their viewers of potential changes in service, particularly given that stations may implement the repacking under different circumstances. Broadcasters understand their audiences best, and thus can tailor educational campaigns towards their specific audiences.¹¹⁶ It is particularly important to provide stations with discretion with regard to consumer education regarding the repacking process given that, unlike with the DTV transition in which all stations were required to cease analog broadcasts on the same dates, repacked stations will be transitioning under varying circumstances. For example, some stations will seek to transition to their new channels very quickly whereas other stations may be required to take time to construct facilities on their repacked channels. Moreover, the nature of the relocation will vary among stations, as some stations may be moving

facilities for KGO-TV and the ten other broadcast stations that collectively broadcast from Mt. Sutro in San Francisco was a complicated undertaking that took several years to coordinate and implement. *See, e.g.*, BDTUCT-20090416AFN (KGO-TV); BDTRCT-20080219AGX (KTVU); BDTUCT-20090420ACL (KPIX); BDTRET-20080219BES (KCSM-TV).

¹¹⁵ *See Incentive Auction NPRM* ¶ 332.

¹¹⁶ For example, when WLS conducts outreach efforts to inform viewers of the need to re-scan equipment to receive channel 44 (rather than channel 7), it will target specifically those viewers who rely on free, over-the-air television service to receive news and safety information. To this end, WLS will utilize both the broadcast of advertising spots in the programming aired on WLS and news stories encouraging viewers to rescan their equipment. Practices such as those to be employed by WLS—or other similar practices as determined by the affected station—should be sufficient to allow viewers time to consider their options for viewing any broadcast programming that may be affected by the repacking process.

from a UHF channel to a VHF channel, others may be sharing channels, and others may be ceasing broadcasts. Under these circumstances, the Commission must provide stations with flexibility to target their messages to meet their specific situation.

VII. THE COMMISSION SHOULD PROVIDE MAXIMUM FLEXIBILITY FOR WIRELESS MICROPHONE OPERATIONS TO USE ALL SPECTRUM CURRENTLY AUTHORIZED FOR WIRELESS MICROPHONE USE

In the *NPRM*, the Commission states that, following the incentive auction process, the amount of spectrum available for wireless microphone operations may be reduced because, not only might the repacking result in a decreased amount of UHF spectrum, the Commission also is proposing to eliminate the two channels currently reserved for interference-free wireless microphone operations. As demonstrated below, broadcasters, video programming networks, and other entities in the entertainment industry utilize wireless microphones every day on an extensive and widespread basis to cover news and sports events. Such use is not occasional, fleeting use but rather is an absolute necessity to ensure that the sounds of events are heard by viewers, as well as to facilitate seamless communications between producers and talent. Accordingly, the Commission must ensure that its rules provide maximum flexibility for wireless microphone operations following the incentive auction process. In particular, the Commission should not in any manner limit or restrict wireless microphone operations in any spectrum currently permitted under FCC rules and policies but rather should adopt rules that ensure sufficient spectrum for wireless microphone uses such as those described herein.

A. Wireless Microphones Are Essential To The Production of Programming And The Coordination of Events

As an initial matter, Disney wishes to emphasize the critical role that wireless microphones play every day in its production of programming. ESPN, for example, uses wireless microphones for its commentators and for on-the-field reports. Wireless microphones

also are essential to ESPN's production efforts, and are utilized by ESPN's production teams to communicate directly with the talent.¹¹⁷ Additionally, wireless microphones play an integral role in ESPN's ability to bring the sounds of an event to its viewers. In many venues, wireless microphones are required due to venue-specific prohibitions against the use of wired microphones. Indeed, one of the most common sources of liability at professional events is injury resulting from an individual tripping over cable. Moreover, wired microphones cannot be used at certain events because cables present serious safety concerns.¹¹⁸ In short, ESPN is able to use wireless microphones where laying cable is not possible or practical, or where laying cable may create a safety hazard to the participants and general public in the venue. Notably, ESPN uses wireless microphones to cover events throughout the nation, often in congested urban areas where sporting events are likely to occur. Thus, ESPN knows firsthand the challenges of coordinating spectrum for wireless microphone use.¹¹⁹

Like ESPN, ABC News and the ABC Owned Television Stations rely on wireless microphones heavily to support their broadcast operations. Wireless microphones are used both in-studio as well as out in the field for coverage of "breaking news" events. For example, wireless microphones are critical to the ability of KABC to deliver over seven hours of local news on a daily basis to its viewers in Los Angeles, California. To this end, KABC operates between twenty-five and one hundred wireless microphones and other itinerant communications links each day. KABC also uses UHF television spectrum to employ a two-way radio

¹¹⁷ For example, production of the X-Games involved the use of thirty-five wireless microphones on more than forty frequencies. *See infra* Section VII.B and note 122 and accompanying text for more detailed discussion regarding number of frequencies used by ESPN to support its wireless operations.

¹¹⁸ For example, it is not possible to lay cable in pits at motorsports events given the number of people in the area and the fact that cars are racing in and out of the pit.

¹¹⁹ *See infra* note 122 and accompanying text.

communication system to support its “in-the-field” coverage efforts.¹²⁰ Similarly, on any given day, WLS uses wireless microphones to facilitate its coverage of thirty to fifty breaking news events at disparate locations throughout the Chicago DMA.¹²¹ Additionally, each weekday, WLS produces seven in-studio programs throughout the day, each of which uses eight to twelve wireless microphones that require UHF spectrum. In-studio productions also use one or two UHF channel pairs for intercom communications. WLS also uses wireless IFBs on six channels on an ongoing basis throughout each day to send cues and program audio to talent on the set.

B. Programmers Rely On Wireless Microphone Operations On An Extensive And Widespread Basis Every Day And Require Spectrum To Support These Needs

In adopting rules to govern the incentive auction process, not only should the Commission recognize the essential role of wireless microphones to the operations of broadcasters, programmers and entertainment venues, it also is imperative that the FCC recognize and adopt rules to support and protect the extensive and widespread use of such wireless spectrum. For example, ESPN’s experiences demonstrate that programmers use broadcast television spectrum on a widespread and extensive basis to support their coverage of events. As evidenced by Exhibit A hereto, nearly sixty percent of the 3,200 events televised by ESPN in 2012 utilized spectrum in the broadcast television band to support its wireless microphone operations.¹²² ESPN estimates that its studio operations in Bristol, Connecticut

¹²⁰ This two-way radio system is used on a daily basis for communications among production crews but also is designed to provide support in the event of loss of commercial services in a disaster situation. Although KABC has begun to use digital modulation to maximize spectrum efficiency, any loss of bandwidth in the UHF television band currently available for these operations will limit the station’s ability to continue providing news and information to the public after a major disaster such as an earthquake.

¹²¹ WLS typically fields approximately thirty transmitters each day and these transmitters frequently are utilized to cover more than one story. WTVD also uses wireless microphones to facilitate its coverage of news events in the Raleigh-Durham area and, on an average day, may cover twelve or more news stories.

¹²² See Exhibit A, ESPN Remote UHF Utilization.

alone used 245 UHF frequencies over thirty-one channels *in a single day*.¹²³ Coverage of one college football game by ESPN uses twenty-five UHF frequencies over nine television channels. Notably, ESPN's estimated use of television spectrum for its wireless microphone operations is conservative, and ESPN often requires more frequencies and channels than listed on Exhibit A.

It also is important to take into account that a single programmer does not operate wireless microphone systems to cover an event in isolation. Rather, there are frequently multiple entities covering a single event. For example, ESPN uses forty frequencies over twelve television channels to support its wireless microphone operations at a Monday Night Football game.¹²⁴ At this same event, the National Football League will operate facilities that "heavily use and rely upon wireless equipment" to enable coaches to communicate with players, to facilitate communications among referees, and to coordinate operations by teams.¹²⁵ As has been observed by the professional and collegiate sports organizations, "at particular large sporting events, more than 300 wireless microphones across multiple open TV channels may be utilized."¹²⁶

Similarly, local and national news events are almost always covered by multiple news operations, such that there are any number of wireless microphones for which spectrum must be

¹²³ More specifically, ESPN currently operates eight separate studios, as well as one facility for outdoor studio segments, in Bristol, Connecticut. These studios are used to produce programming on a daily basis, often concurrently. The majority of the studios utilize thirty frequencies to assist in program production, and at least one studio uses nearly fifty frequencies each day. These frequencies are used for wireless microphones, IFBs, and communications channels. ESPN's use of spectrum for licensed wireless microphones is anticipated to increase at the end of the first quarter of 2013 when it begins to use four additional studios for its program productions in Bristol.

¹²⁴ *See id.*

¹²⁵ Comments of the Office of the Commissioner of Baseball, National Football League, National Hockey League, National Collegiate Athletic Association, and National Association for Stock Car Auto Racing to *Further Notice of Proposed Rulemaking* in WT Docket Nos. 08-166, 08-167; ET Docket No. 10-24 (filed Mar. 1, 2010).

¹²⁶ *See id.* These wireless microphones may be operated by regional sports networks, local television stations, or other media outlets covering the sporting event.

coordinated.¹²⁷ This task is particularly difficult when covering news events in major urban areas, such as Washington, D.C., Los Angeles, New York, or Chicago. For example, coverage of the recent Inauguration of President Barack Obama (“Inauguration”) on January 21, 2013 required over 108 MHz total bandwidth over twenty-five UHF television channels to support wireless microphones, IFBs (for cueing talent and program return), and communications channels.¹²⁸ ABC News estimates that, from January 13 through January 21, it alone used approximately seventy-eight UHF frequencies over twenty-five UHF television channels for wireless microphones used to support its coverage of the Inauguration on television and radio. Moreover, in addition to ABC News, the Inauguration was covered by a significant number of media outlets, including CBS News, CBS Radio News, CBS’s news magazine programs, NBC News, MSNBC, NBC’s The Today Show, FOX News Channel, Cable News Network, Univision, Eurovision, British Broadcasting Corporation, NPR (formerly National Public Radio), Cable-Satellite Public Affairs Network, Black Entertainment Television, NY1 News, Hearst Television, Inc., at least twelve independent television stations and The Presidential Inauguration Committee. Due to the vast number of media outlets covering the Inauguration, coordination began in November 2012 and continued through January 19, 2013. Moreover, because the amount of UHF spectrum available for wireless microphone use simply did not meet demand, the coordination committee was tasked with determining the best means to efficiently use scarce UHF spectrum resources.¹²⁹

¹²⁷ For example, on a single day in December, at least half of the local news events covered by WTVD in the Raleigh-Durham area also were covered by at least one or two other news outlets utilizing wireless microphones.

¹²⁸ Several hundred frequencies were coordinated throughout the Washington, D.C. area for this event.

¹²⁹ Specifically, the coordination committee for the Inauguration developed a coordination plan that enabled frequency re-use, *e.g.*, a microphone frequency that was

Spectrum constraints exist not only with the coverage of national events, but also on a daily basis as stations seek to provide their viewers with local news and information. KABC, for example, must coordinate spectrum for its wireless needs with at least seven other local news operations as well as major television networks and sports production companies. This task is quite difficult, given that Los Angeles is one of the markets in which microwave spectrum is highly congested, due to the fact that the city is home to a significant number of entities that require wireless microphones, including film and television production studios, theme parks, and other entertainment venues. Any reduction in wireless spectrum assets without a corresponding action to offset these losses would have a detrimental impact on local broadcasters' ability to serve their viewers as well as upon the other entertainment venues that rely on UHF television spectrum to support their wireless needs.¹³⁰ In short, it is critical that the Commission not take action that will reduce the amount of spectrum available for wireless microphones and other similar devices (*e.g.*, IFBs) because, as demonstrated herein, the itinerant links used for these operations are essential to broadcasters' coverage of local and national "breaking news", sports and other live entertainment events.

C. The FCC Must Retain Two Dedicated Channels For Wireless Microphones And Authorize Spectrum For Interference-Free Wireless Microphone Communications

Although Disney appreciates the Commission's need to repack broadcast stations in order to facilitate the incentive auction process, it is imperative that the FCC take whatever actions are necessary to preserve spectrum for wireless microphone operations by broadcasters and cable

coordinated for ABC News on Capitol Hill could be re-used at Lafayette Park for CBS, a few miles away.

¹³⁰ In Los Angeles, for example, most television news operations rely heavily on the 2 GHz band for their electronic news gathering ("ENG") operation because virtually all of the 7 GHz and 13 GHz bands are consumed with fixed links. While great efforts are expended on coordination and efficient usage, congestion often forces local news operations to use of unlicensed bands, which does not ensure interference-free wireless communications.

networks like ESPN. As evidenced in these Comments, there is significant demand for spectrum for wireless microphone operations each day, and that demand will continue to grow. Thus, any reduction of UHF spectrum for wireless microphone use will degrade the quality of production of events such as those produced by ESPN, ABC News, and the ABC Owned Television Stations. This is especially the case given the unique qualities of UHF spectrum, which enables low power signals to propagate over large distances and facilitates the use of small antennas with minimal gain.¹³¹ Unfortunately, however, UHF spectrum for wireless microphone use often is congested and unavailable, particularly given that wireless microphones no longer are permitted in the 700 MHz band. Thus, today's wireless microphone needs cannot be satisfied by relying on UHF spectrum alone. For example, ESPN frequently relies on spectrum from other bands, including frequencies in the 900 MHz, 1.4 GHz and other spectrum bands (pursuant to special temporary authorization as necessary). This is frequently the case when producing events in large cities, such as Los Angeles, Dallas, and Chicago where spectrum for wireless operations is particularly limited.

Accordingly, Disney urges the Commission to continue to permit wireless microphone use in the television bands to the maximum extent permitted under current rules and to adopt rules that will support the extensive spectrum needs of wireless microphones. Specifically, the Commission should (i) retain spectrum solely for use by licensed wireless microphone systems, including by retaining the two channels currently reserved for licensed wireless use and by creating new blocks of spectrum for wireless microphones to operate on an interference-free

¹³¹ It also is notable that UHF spectrum has been harmonized globally for wireless microphone use, and manufacturers have developed equipment in reliance on this global harmonization. Thus, should the FCC take action to further mitigate the use of wireless microphones in the UHF band, another harmful effect is that possibility that equipment costs may increase as manufacturers are forced to develop wireless equipment that can only be used in the U.S.

basis; (ii) authorize operations of wireless microphones in guard band spectrum; and (iii) permit wireless microphones to operate in any spectrum authorized for WiFi and other unlicensed devices, including on unused spectrum (*i.e.*, white spaces) in the television band.¹³²

VIII. CONCLUSION

Disney understands and appreciates the need to develop rules for the incentive auction and repacking that will enable the Commission to recapture adequate spectrum for wireless broadband. In so doing, however, the FCC must ensure that its rules for the repacking not only facilitate replication of existing over-the-air audiences of full-power television broadcasters, but also that these rules (1) do not contravene legislative intent governing either the Spectrum Act or the full-power DTV transition or (2) act as a disincentive for broadcasters to relinquish UHF spectrum in favor of a VHF channel.

Specifically, the Commission should interpret the Spectrum Act to protect licenses and construction permits authorized or applied for after February 22, 2012, particularly with respect to FCC authorizations that enable a VHF station to replicate its historical over-the-air viewing area. The Commission also should ensure that stations are provided sufficient time to engineer and construct facilities impacted by the repacking and maximum flexibility to educate their viewers regarding the process. Finally, in light of the extensive and widespread use of UHF

¹³² In the *NPRM*, the Commission proposes to make available for general unlicensed use (1) the two channels currently reserved for licensed operations of low power auxiliary stations (“LPAS”) and wireless microphones and (2) newly available guard band spectrum. *Incentive Auction NPRM* ¶¶ 234, 238. As the National Association of Broadcasters observes in its comments in this proceeding, the Commission expressly determined in its white spaces proceeding that it was necessary to reserve two channels for licensed wireless microphones and other LPAS operations licensed under Part 74 to ensure that licensed operations used in ENG activities would be protected from interference from white spaces devices. *See* NAB Comments, *supra* note 97, at Section IV.B.5. Although the repacking may reduce the amount of UHF spectrum available for wireless microphone and LPAS operations, this does not in any way mitigate the need to protect operations licensed under Part 74, particularly given that these operations are critical to the coverage of live news, weather, and sporting events.

spectrum for wireless microphones, the Commission should not in any manner limit or restrict wireless microphone operations in any spectrum currently permitted under FCC rules and policies but rather should adopt rules that ensure sufficient spectrum for these important services.

Respectfully submitted,

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EXHIBIT A

ESPN Remote UHF Utilization

In 2012, ESPN will televise approximately 3,200 events, 1,784 of which will utilize wireless microphones, communications and talk back to talent.

The following is a conservative representation of one week of wireless utilization across all of the ESPN networks nationwide.

The TV Channel totals as listed below are indicative of the available frequencies/channels coordinated in a given market.

Tuesday 11/06/2012:

1-College Football Game: **25** UHF Frequencies @ **2.604** MHz Total Bandwidth over **9** TV Channels.

Wednesday 11/07/2012:

1-College Football Game: **25** UHF Frequencies @ **2.604** MHz Total Bandwidth over **9** TV Channels.

2-NBA Games: **24** UHF Frequencies @ **2.352** MHz Total Bandwidth over **8** TV Channels.

Thursday 11/08/2012:

2-Studio Shows Veterans Day: **20** UHF Frequencies @ **2.160** MHz Total Bandwidth over **8** TV Channels.

2-College Football Games: **50** UHF Frequencies @ **5.208** MHz Total Bandwidth over **18** TV Channels.

1-Soccer Game: **7** UHF Frequencies @ **720** KHz Total Bandwidth over **3** TV Channels.

Friday 11/09/2012:

6-College Basketball Games: **36** UHF Frequencies @ **3.888** MHz Total Bandwidth over **18** TV Channels.

1-College Football Game: **25** UHF Frequencies @ **2.604** MHz Total Bandwidth over **9** TV Channels.

1-NBA Game: **12** UHF Frequencies @ **1.176** MHz Total Bandwidth over **4** TV Channels.

Saturday 11/10/2012

1-Studio Show Game Day: **20** UHF Frequencies @ **2.160** MHz Total Bandwidth over **8** Channels.

21-College Football Games: **525** UHF Frequencies @ **54.684** MHz Total Bandwidth over **189** TV Channels.

1-NASCAR Event: ESPN utilizes **one**, 6 MHz TV channel for communications. Due to the crowded spectrum in the UHF TV channels, ESPN utilizes frequencies under a STA the 1.4 and 2.3 GHz bands to accommodate the wireless microphones use.

Sunday 11/11/2012:

4-College Basketball Games: **100** UHF Frequencies @ **2.592** MHz Total Bandwidth over **36** TV Channels.

1-NASCAR Event: ESPN utilizes **one**, 6 MHz TV channel for communications. Due to the crowded spectrum in the UHF TV channels, ESPN utilizes frequencies under a STA the 1.4 and 2.3 GHz bands to accommodate the wireless microphones use.

1-NHRA Event: ESPN utilizes **one**, 6 MHz TV channel for communications. Due to the crowded spectrum in the UHF TV channels, ESPN utilizes frequencies under a STA the 1.4 and 2.3 GHz bands to accommodate the wireless microphones use.

1-Soccer Game: **7** UHF Frequencies @ **720** KHz Total Bandwidth over **3** TV Channels.

Monday 11/12/2012:

9-College Basketball Games: **54** UHF Frequencies @ **6.120** MHz Total Bandwidth across **27** TV Channels.

1-Studio Show NFL Game Day: **20** UHF Frequencies @ **2.160** MHz Total Bandwidth over **8** Channels.

1-Monday Night NFL: **40** UHF Frequencies @ **4.248** MHz Total Bandwidth over **12** TV Channels.

ESPN Studio Operations:

Bristol, CT:

245 UHF Frequencies @ **24.2** MHz Total Bandwidth over **31** TV Channels.

Los Angeles Studio Operations:

42 UHF Frequencies @ **3.320** MHz Total Bandwidth over **8** TV Channels.

Longhorn Studio Operations:

34 UHF Frequencies @ **3.384** MHz Total Bandwidth over **13** TV Channels.

Charlotte Studio Operations:

31 UHF Frequencies @ **3.072** MHz Total Bandwidth over **10** TV Channels.